

IN THE SUPREME COURT OF MISSISSIPPI

**MARK C. MODAK-TRURAN AND ANITA K.
MODAK-TRURAN and
DANIEL M. BAKER AND
KATHERINE S. BAKER**

APPELLANTS

VS.

CASE NO. 2008-CA-00104

CONSOLIDATED WITH CASE NO. 2008-CA-00105

**MAYOR HARVEY JOHNSON, IN HIS OFFICIAL
CAPACITY ONLY AND THE CITY COUNCIL OF
JACKSON, MISSISSIPPI, CAROL N. SIMMONS,
AND WILLIAM J. SIMMONS, DECEASED D/B/A
THE FAIRVIEW INN**

APPELLEES

**ON APPEAL FROM ORDER OF THE
CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI**

**RESPONSE BRIEF
OF THE MAYOR AND CITY COUNCIL
OF JACKSON, MISSISSIPPI, APPELLEE**

TO THE BRIEF OF APPELLANTS DANIEL M. AND KATHERINE S. BAKER

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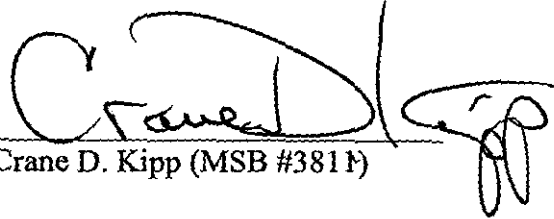
JOINDER

COME NOW, Carol N. Simmons, individually and as Executor of the Estate of William J. Simmons, deceased, formerly d/b/a The Fairview Inn, Intervenor in the above captioned appeal, by and through counsel, and join in the Motion for Leave of Court to file Supplemental Response of the Mayor and City Council of the City of Jackson, Mississippi, filed in this cause in response to the brief of Appellees, Mark and Anita Modak-Truran, and pray for all appropriate relief attendant thereto.

RESPECTFULLY SUBMITTED, this the 13th day January, 2009.

CAROL N. SIMMONS, INDIVIDUALLY AND AS
EXECUTOR OF THE ESTATE OF WILLIAM J.
SIMMONS, DECEASED, FORMALLY d/b/a
THE FAIRVIEW INN, INTERVENOR

BY:


Crane D. Kipp (MSB #381 F)

MOTION # 2009-42

CERTIFICATE OF SERVICE

I, Crane D. Kipp, do hereby certify that I have this day caused a true and correct copy of the foregoing Joinder to be mailed, postage prepaid, via U.S. Postal Service, and e-mail, to the following:

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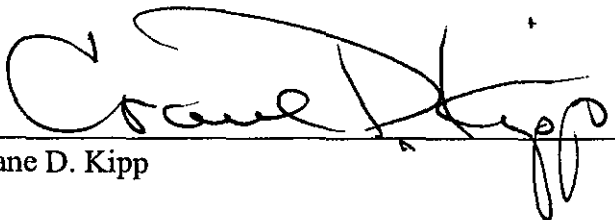
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Crane D. Kipp

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AMENDED CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss.R.App. 28(a)(1), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

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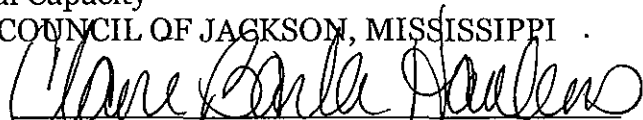
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CITY COUNCIL OF JACKSON, MISSISSIPPI

By:



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Special Assistant to the City Attorney
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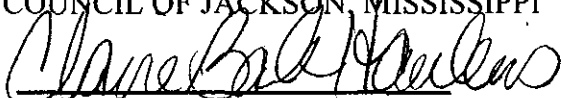
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Respectfully submitted,

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Capacity

CITY COUNCIL OF JACKSON, MISSISSIPPI

By:



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STATEMENT OF THE ISSUES

1. WHETHER THE APPELLANTS HAVE MET THEIR BURDEN ON APPEAL TO SHOW THAT THE JACKSON CITY COUNCIL'S LEGISLATIVE ADOPTION OF TEXT AMENDMENT 5 IN APRIL, 2004, OTHERWISE PRESUMPTIVELY VALID, WAS ARBITRARY, CAPRICIOUS, DISCRIMINATORY, ILLEGAL, NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, AND NOT "FAIRLY DEBATABLE".
2. WHETHER APPELLANTS HAVE MET THEIR BURDEN ON APPEAL TO SHOW TEXT AMENDMENT 5, OTHERWISE PRESUMPTIVELY VALID, CREATES AN IMPERMISSIBLE REZONING OF THE FAIRVIEW INN'S PROPERTY FROM A CLASS B BED AND BREAKFAST INN WITH A RESTRICTED PERMANENT USE PERMIT WITHIN R-2 RESIDENTIAL ZONING, TO AN UNRESTRICTED C-3 GENERAL COMMERCIAL RESTAURANT, RESULTING IN ILLEGAL "SPOT ZONING".
3. WHETHER APPELLANTS HAVE MET THEIR BURDEN ON APPEAL TO SHOW THE CITY COUNCIL'S ADOPTION OF TEXT AMENDMENT 5 AND ITS PROCEDURES FOR AN EXISTING CLASS B BED AND BREAKFAST INN PERMIT HOLDER TO OBTAIN A RESTAURANT USE, OTHERWISE PRESUMPTIVELY VALID, WAS NOT WITHIN THE CITY COUNCIL'S DISCRETION.
4. WHETHER APPELLANTS HAVE MET THEIR BURDEN ON APPEAL TO SHOW THE CITY COUNCIL'S ADOPTION OF TEXT AMENDMENT 5, OTHERWISE PRESUMPTIVELY VALID, DEPRIVED APPELLANTS OF A FULL AND FAIR HEARING, OR VIOLATED THE APPELLANTS' RIGHTS TO DUE PROCESS.

STATEMENT OF THE CASE

The City Council of the City of Jackson, Mississippi at a hearing on April 7, 2004, voted unanimously 5-0 to adopt certain text amendments to its existing 1974 City Zoning Ordinance, as amended. (R.159). The City Council adopted the text amendments by following the "Procedure for Text Amendments" set out in the City's zoning ordinances at Section 1704-A which requires the publication of notice and a public hearing, "before the City Planning Board and/or City Council". Section 1704.02-A. The Appellants have appealed the City Council's adoption of the two sections of Text Amendment 5 to this Court. Text Amendment 5, Section 1 amends City ordinance Section 202.17 defining Bed and Breakfast Inn Class B by adding a new definition under Class B Inns for a "Class B Bed and Breakfast Inn With Restaurant" (as Section

202.17(a)). Text Amendment 5, Section 2 amends Section 602.02.3, "Uses which May Be Permitted as Use Permits", by adding language concerning procedures for adoption of a "Class B Bed and Breakfast Inn With Restaurant" use by either a new use permit applicant or by any existing Class B Bed and Breakfast Inn use permit holder. The text amendments pertaining to the Bed and Breakfast Inn definitions were presented to the Council at the request of city council members. (R.361).

The Appellants appealed the decision of the Jackson City Council to the Circuit Court of Hinds County, First Judicial District. The Court appointed a special master who on October 3, 2007, "after weighing all of the evidence", found that the amendments constituted "spot zoning", and recommended that the Court rule in favor of the Appellants (R.E. Order, p.41). The Circuit Court issued its Memorandum Opinion and Order on December 4, 2007, finding that the special master's conclusion "cannot be reconciled with the record" in light of "evidence of public need in the record, and such evidence vitiates the 'spot zoning argument.'" (R.E., Order p.17). The Circuit Court ordered that the special master's report and recommendation be rejected and that the amendments of the City of Jackson be affirmed. (R.E, Order p.21).

STATEMENT OF THE FACTS

I. Introduction: City Council Adoption of The Proposed Text Amendments

The members of the City Council of the City of Jackson, Mississippi at a hearing on April 7, 2004, voted unanimously 5-0 to adopt certain text changes to the existing 1974 City Zoning Ordinance, as amended (R.151-159). The adopted text changes addressed a variety of issues including the following:

1. **Text Amendment 3** amends the definition of a Bed and Breakfast Inn Class B at Section 202.17 to change the words "social gatherings" to "private functions":

202.17 Bed and Breakfast Inn Class B: An owner-occupied dwelling, which is the primary residence of the owner and where a portion of the dwelling is available for short-term lodging and where receptions and other similar private functions may be held. Meals may only be served to lodgers, and guests of receptions and other private functions. For purposes of this definition a private function means a pre-planned, organized social event for which one host or hostess is responsible. It has defined beginning and ending times and is a celebration of a specific event such as a wedding, high school or college graduation, corporate event or a reception honoring a special person. (R.154).

2. **Text Amendment 4** tightens the historic qualification criteria for a Bed and Breakfast Inn Class B (amending ordinance section 202.17). (R.154).

3. **Text Amendment 5**, as amended, which is the subject of Appellants' appeals, includes text changes to two sections of the city's ordinances (R. 158): **Section 1** amends Section 202.17 defining Bed and Breakfast Inn Class B to include a new paragraph defining a Class B Bed and Breakfast Inn With Restaurant (as Section 202.17(a)):

Section 202.17(a) Bed and Breakfast Inn with Restaurant:

An owner-occupied dwelling, which is the primary residence of the owner and where a portion of the dwelling is available for short-term lodging and where receptions or other similar private functions may be held. Meals may be served to lodgers, guests of receptions and other private functions and the general public as follows: A Bed and Breakfast Inn, Class B with Restaurant may engage in the preparation and retail sale of food and beverages including sale of alcoholic beverages. Customers are served their foods, or beverages by a restaurant employee at the same table at which said items are consumed. Advertising on local billboards is prohibited. This prohibition will not preclude, however, mailings or advertisements in newspapers and in national, regional, state or local travel and tourism periodicals. (See Section 602.03—3). (R.158. Emphasis added).

Section 2 amends Section 602.02.3, Uses which May Be Permitted as Use Permits, by adding the language at paragraph 4 below noted in bold:

602.02.03 Uses Which May be Permitted as Use Permits:

The flowing uses are permitted provided they are established in accordance with procedures and provisions of this Ordinance:

Bed and Breakfast Inns Class A and B: The following uses are permitted provided they are established in accordance with the procedures and provisions of this Ordinance:

3. Bed and Breakfast Inn Class A and B:

4. Class B Bed and Breakfast Inn with Restaurant: It is expressly understood that a separate Use Permit is required to operate a restaurant in a Class B Bed and Breakfast Inn. Any existing Class B Bed and Breakfast Inns who determine that they wish to operate a restaurant in conjunction with their Class B Bed and Breakfast Inn is permitted to do so by right subject to receipt of a statement indicating this election to include a requirement that a Bed and Breakfast Inns with Restaurant clear site plan review from City Staff. (R.158 Emphasis added.)

Council member Margaret Barrett-Simon at the City Council hearing moved for an additional requirement that a Bed and Breakfast Class B Inn With Restaurant first obtain clearance of the use from the City's Site Plan Review Committee (R.158).¹ The Council voted unanimously to accept the amendment (R.143-145, 158). Ms. Barrett-Simon stated she was moving to add the language to Section 602.02.03 to add the requirement that the City staff review any issues of traffic, parking, truck deliveries, and other site plan issues (the complete list of issues for review is set forth in the City's Site Plan Review Ordinance, Sections 1201-1204). (R.E., Ordinance pp. 92-95; R.143-145, 158). The addition of a Site Plan Review requirement is in accordance with City Ordinance Section 1201-A requiring a review "to ensure compliance with City zoning and other ordinances". (R.E., Ordinance p. 92; R.190).

Following the vote of the City Council members adopting Text Amendment 5 to the City Ordinances, as amended by Ms. Barrett-Simon's motion, Council President Dr. Leslie McLemore declared the meeting of the City Council of April 7, 2004, adjourned. (R.159).

¹ The Site Plan Review Committee is chaired by the Planning Director and consists of representatives of the following City Departments and/or Divisions: Water/Sewer Utilities, Streets, Bridges and Drainage, Fire Department, Building and Permit, City Traffic Engineering, Legal Department, Landscape Ordinance Administration, Zoning Administration, Police Department and Land Use Planning Department. R.E., Ordinance Section 1202-A, p.93.

On Monday, April 19, 2004, the four Appellants, Daniel and Katherine Baker and Mark and Anita Modak-Truran, filed with the Clerk of the City of Jackson separate Bills of Exception appealing the two text changes included in Text Amendment 5 relating to Class B Bed and Breakfast Inns. The four Appellants are each lawyers appearing herein *pro se*. The Bills of Exception stated that the appellants objected to the City's adoption of Text Amendment 5 amending the City's Zoning Ordinance at Sections 202.17(a) and 602.02.03. The appellants' separate appeals were later consolidated.

II. Hearing Before the Planning Board of the City of Jackson, January 28, 2004

Prior to the hearing before the City Council, the City of Jackson Planning Board held a hearing on the proposed text amendments on January 28, 2004. (R.358). The Deputy Director of the Office of City Planning, Corrine Fox, made a report to the Board. (R.361-370). Ms. Fox noted that the text amendments pertaining to the Bed and Breakfast Inn definitions were presented at the request of city council members. (R.361). Stratton Bull, the President of the Belhaven Improvement Association (BIA), then spoke in favor of the proposed text amendments as they related to the existing Class B Bed and Breakfast Inn in the neighborhood, The Fairview Inn (R.14). The BIA is the officially designated neighborhood association for the Belhaven neighborhood (R.371). Mr. Bull introduced the BIA's letter of support that followed the BIA Board's vote on January 26, 2004, to approve the text amendments (R.371, 234). Mr. Bull noted that the BIA had changed its position to vote in favor of the amendments after the Fairview Inn addressed certain issues relating to off street parking and sales of alcoholic beverages. "Dealing with off-street parking, they have a parking lease next door, and they did a cut-through so that people can come from the parking lot directly into their property." (R.373). Also, "...we don't want Fairview to be a bar...if they have a restaurant and they have sales of alcohol, it would have to be in conjunction with the service of a meal, and at the table." (R.373). Mr. Bull also

noted that, "Belhaven is a mixed-use neighborhood to some extent, and we feel like this might be or could be an opportunity to sort of enhance...mixed uses in a neighborhood." (R.373-374).

Following Mr. Bull's statement the attorney for The Fairview Inn, Crane Kipp, spoke in favor of the proposed text amendments affecting the definitions and use permits permitted to Class B Bed and Breakfast Inns (R.375). Mr. Kipp, who stated that The Fairview Inn had operated under a permanent use permit as a Class B Inn for eleven (11) years since 1993, introduced a package that included a copy of Fairview's lease of a parking lot at a commercial building adjacent to its property (the 1600 Building located at the corner of North State and Fairview Streets), a diagram of the cut-through from the 1600 Building parking lot to the Inn, letters of support for the amendments, and a copy of a notice of the hearing before the Board along with Mr. Kipp's certification that he had sent it to all landowners within 160 feet of The Fairview Inn (R.375-382). Mr. Kipp noted that text amendment requirements do not require notice to specific landowners but that he had sent the notice so that landowners in the area around The Fairview Inn would have a direct notice of the text amendment proposals (in addition to the newspaper notice) and to provide them notice of the Board's meeting so they would have the opportunity to speak (R.376-377). Fourteen (14) witnesses then appeared to speak in favor of the proposed text amendments (R.382-405).

Following the witnesses for the proponents Mr. Dan Baker, who with his wife lives across the street from the Fairview Inn, appeared as an attorney for the objectors (R.407). Mr. Baker introduced into the record a memorandum "of all our points" in opposition to the amendments, including the petitions of 27 homeowners (R.407-408). Four additional speakers followed Mr. Baker objecting to the amendments (R.416-430), including attorney Mark Modak-Truran who, with his wife Anita, also lives across the street from the Fairview Inn and next door to the Baker's (R.416). The President then allowed Mr. Baker additional time to speak again

against the amendments, this time as an individual (R.430-433). The Board then took a vote of those “in favor of the motion to approve the text amendments” but the motion failed “three-four-one” resulting in what was said to be a “no recommendation” or “negative recommendation” to the City Council (R.443-444).

Since the text amendments were a City matter initiated at the request of a City Council member, the text amendments went on to the City Council for hearing as a new matter under the City’s Procedure for Text Amendments (Ordinance 1704-A, R.E.p.85). The ordinance allows the City Council to adopt text amendments at a public hearing following publication of a notice of the hearing. The hearing was originally scheduled and published for March 17, 2004, but the Council continued the March 17 hearing without adjournment to the regular zoning meeting of the City Council on April 7, 2004 (R.148, 328) at which time it took up the text amendments.

III. PRESENTATIONS AT THE HEARING BEFORE THE CITY COUNCIL ON APRIL 7, 2004

A. Report of the Planning Department

Corrine Fox, the City Deputy Director of Planning, and Mary Merck, the Zoning Administrator, reported to the City Council on the text amendments and answered questions from Council members (R.2-40). Ms. Fox and Ms. Merck noted that the third amendment changing “social gatherings” to “private functions” clarified the circumstances under which Bed and Breakfast Class B Inns were already permitted to provide meals for including celebrations of graduations (R.6), holiday parties (R.10), wedding receptions, luncheon parties, cocktail parties, and other functions and receptions (R.14, 17) as well as meals and beverages to their overnight lodgers (R.14). Ms. Fox stated the text amendments “relate to the city as a whole” although presently there was only one existing Class B Inn in the City, The Fairview Inn (R.7).

In her discussion of the fourth proposed amendment Ms. Fox noted that the ordinances required a bed and breakfast inn in the city to be located in a residence listed on the national register or designated historic landmark by the Jackson Historic Preservation Commission (R.35). The fourth amendment tightened the qualifications further to eliminate location in a "historic district" as sufficient to qualify the structure (R.35). She also noted that a bed and breakfast inn had to be in "an owner-occupied structure in a residential district", and provide off-street parking. (R.37-38).

As to the fifth text amendment, Ms. Fox stated that the addition of a new definition for a Class B Bed and Breakfast With Restaurant "does not necessarily mean that all Class B bed and breakfasts in the future will have a restaurant. They will have a choice." (R.12).

The Assistant City Attorney present, Valorri Jones, stated the amendments were not an application by a particular person for rezoning but had been brought forth by a council person to amend the texts of the existing city ordinances. (R.43-44).

Following the Planning Department's presentation the Council President announced that the lawyers for the proponents and opponents of the fifth text amendments would each be given ten (10) minutes to make their arguments (R.40, 50). The President also noted that members of the public were "here on both sides of this issue" and had signed up to speak (R.47).

B. Presentation of the Attorney for the Proponents of Text Amendment 5

Following the Planning Department's presentation, Crane Kipp, an attorney for the Fairview Inn speaking on behalf of the proponents of the amendments, addressed the Council (R.49, 51). Mr. Kipp noted that the Fairview Inn is an historic inn that is a member of the hospitality industry (R.53). He stated that there is a public need in the City to preserve its historic buildings and that many grand houses in the State Street area were now gone because individuals could not support and maintain them. Fairview Inn is one of the last remaining

historic, architecturally designed homes in the area. (R.53). He stated that certain neighbor's concerns of an "intrusion in the neighborhood" was unfounded since as to serving guests, "Fairview Inn has had a use permit to do exactly this since 1993 and has been having wedding receptions and social gatherings ever since then. That's nothing new." (R.54-55). However, the amendments were needed to assist the Inn develop a new source of revenue by service of meals to the public since its income from wedding receptions had fallen off. (R.55). He noted that the wedding receptions the Inn had depended on were "big events, and they draw a lot of people into the neighborhood" but that "dinner in the evenings will draw many fewer and they will be...much more manageable", and all parking would be off-street. (R.55). He further noted:

The comprehensive land use plan for this city calls for the Belhaven neighborhood to be R- --to be residential. This is residential. That zoning is not changing. This is R2 property with a ...permanent use permit, which allows it to remain residential and retain its residential character. (R.57-58).

The 1600 [medical] building is...contiguous to the Fairview Inn, and there is, in fact, now a gate and steps leading from the parking lot to the Fairview Inn to make the traffic not go out on to the street and essentially intrude in the neighborhood. ...There is not going to be any harm to the neighborhood. ... - the parking has been dealt with. The traffic has been dealt with. And there is no change in this neighborhood from what has been going on. (R.59-60).

Mr. Kipp introduced into the record a written Statement by the Fairview Inn together with twelve (12) tabbed exhibits (R.55, 227). Fairview's Statement notes:

Fairview has already had a permanent use permit for its historic, owner-occupied B&B Inn in an R-2 zoned area since 1993. The proposal would simply give Fairview the right to choose to advertise its existing fine dining offering directly (offered presently under its authority to serve meals to "social gatherings") as a "restaurant", and without the limitation of day-ahead reservations; it is a modest but vital change to the text affecting the potential scope of Fairview's permanent use permit. The proposed text amendments would not create a change to the zoning map, or change Fairview's existing classification/permit to operate as a Class B Bed & Breakfast Inn within an R-2 zoned area. Fairview would continue to be an owner-occupied Inn within an historic mansion listed on the National Historic Register. Since no map amendment is proposed, since the area would remain zoned R-2, and since the proposed B&B text amendments would modify only a definition that is unique to B&B Inns, the text amendments would not

create change that could be cited as a precedent for commercial development of what will continue to be an R-2 zoned area. [R.228].

Indeed, the modest text changes that could allow an existing historic Class B Inn, already providing fine dining to lodgers and social gatherings, to add a non-reservations restaurant use (following site plan review clearance) in the case of Fairview would involve no change to the residential appearance of its existing structure, no change to the public view of its existing dining room tucked away behind the mansion (pictures of which are attached at R.247-251), and would require no additional off-street parking for the Inn (R.229). The Inn already has 44 spaces on site and the lease of 106 spaces on the property of the 1600 North State building next door (R.229). The Inn's Statement also notes that the amendments include appropriate restrictions over the sale of alcoholic beverages:

The proposed amendments, as clarified by the BIA's modifications, deals in a generic way with an important restaurant issue: it requires that meals or alcoholic beverages be served at the same table at which they would be consumed. With that restriction, Fairview could never have a free-standing bar for the restaurant. Nor, given the unique ambiance and elegance of Fairview as an historic Inn, would we ever want such an operation at the Inn. [R.229].

As to compatibility with the City's existing comprehensive land use plan, the Statement notes:

Since the City of Jackson's existing Zoning Ordinance has for a number of years already provided a permanent use category for a B&B Class B Inn use permit under R-2 zoning, since no zoning map amendment is proposed, and since Fairview already has had a permanent use permit for the B&B Class B Inn under the existing R-2 zoning for over a decade, the proposed text amendments are in accordance with the City of Jackson's existing comprehensive zoning plan, and would not create "spot zoning" as that term has been defined by the Supreme Court. [R.229].

Mr. Kipp then directed the Council to the tabbed attachments to the Statement, starting with Tab A, the Belhaven Improvement Association's letter in support of the amendments (R.55-56). Tab B is a letter of the Deputy Director of Planning, Corrine Fox, dated September 24,

2003, following up on an earlier letter written two days before on September 22, 2003.² Ms. Fox wrote the earlier letter before she had had the opportunity to inspect the Inn's dining operations. The follow-up letter thanked the owners of Fairview for a meeting to discuss their present use of the Inn for fine dining for lodgers and social gatherings and stated:

For clarification purposes, The Fairview Inn does not currently violate the terms of the Zoning Ordinance. [R.244].

The remaining Statement tabs include: pictures and plot plans of the Inn's property (R.246-255); copies of Fairview Inn's leases of off-street parking facilities (R.257-263); the affidavit of notice of the earlier Planning Board Hearing given to all neighbors within 160 feet of the property (R.264, see also 345-349); over 20 letters and emails in support of the amendments (R.265-291); signed petitions in support of the amendments (R.293-320); a newspaper article of Conde' Nast Johansens's naming The Fairview Inn as the 2003 North America and Caribbean Most Outstanding Inn (R.322-325); newspaper notice of the city council hearing (R.327-328); deeds of the appellants showing they moved to the neighborhood after the Inn's operations as a B&B Class B began (R.330-336); and the 1993 Permanent Use Permit of Fairview Inn as a Class B Bed and Breakfast Inn (R.338-344).

C. Presentation of the Attorney for the Opponents of Text Amendment 5

Dan Baker, an attorney representing the opponents of Text Amendment 5 appearing *pro se*, followed Mr. Kipp (R.60, 68). Mr. Baker began by introducing into the record his written "Statement in Opposition" to the text amendments that set out the opponents' position in detail along with the attachment of pictures, a map showing the property of The Fairview Inn and that of its neighbors within 160 feet, the signatures of certain homeowners within 160 feet of the Inn in opposition to the text amendments, additional pictures showing earlier traffic, parking,

² The Modak-Trurans' discussion of the September 22, 2003 letter makes no mention of the follow-up letter two days later and therefore discusses the earlier letter out of context. (Modak-Truran Brief pp. 9-10).

delivery trucks and motor coaches on Fairview Street, ads for the Inn, and a letter from Ms. Fox (R.60, 160-213). Mr. Baker's written submission consisted of 53 pages (R.160-213). Mr. Baker then introduced into the record the transcript of the Planning Board Hearing (R.60, 358-445).

Mr. Baker stated that 28 other owners in the area of the Fairview Inn had signed statements in opposition to the text amendments and argued that the amendments as to the Inn were "equal to rezoning, and it represents spot zoning" (R.64). Mr. Baker argued that the amendments created a new use identical to a general restaurant equal to C-3 activity (65-66), that a restaurant within Fairview was not compatible with the residential character of Belhaven (R.66), would be damaging to surrounding property owners (R.66), would create a hazard to children playing in yards on the street (R.66), was not in harmony with the City's comprehensive plan (R.67, 69), and would increase traffic in the area (R.67).

D. Public Comment by Citizens In Favor of Text Amendment 5

The Council President, Mr. McLemore, next stated that the Council would listen, "to all the folks who have signed the book who wish to speak" on both sides, starting with citizens in favor of the amendments (R.70). A diverse group of nineteen (19) citizens from all parts of Jackson, including Belhaven residents living in the area of The Fairview Inn, spoke in favor of the amendments (R.E. Transcript, R.71-115). The following are highlights:

1. State Senator John Horhn: "...[T]his proposed text change should be approved, and I think of five reasons. Number 1, it creates jobs in the city; Number 2, it generates tax dollars; Number 3, it creates dollar turnover. And this property is a major enhancement to Jackson's high-end accommodations and amenities. ...If you say that Jackson doesn't need this, I say you are wrong. It generates excellent public relations from which the City of Jackson benefits without spending one red cent. ...And I submit to you that these items are in harmony with where Jackson needs to go. And it does so without changing zoning....without disrupting the quality of life in one of Jackson's most stable neighborhoods. ...The Belhaven Neighborhood Association is in favor of this. There are 44 slots on site; there are 106 sites immediately adjacent to the property. Parking is not a problem. ...we're trying to create a tourism

environment. I'm working ...at the state senate right now trying to assure we get...the best amenities that we can offer to visitors" (R.71-73).

2. Belhaven College President Roger Parrott: "...I believe it is an enrichment property for our city that could not be replaced. ...[I]t's expensive especially to do it in historic buildings. ...[I]n the last eight years we have put millions and millions of dollars into the Belhaven neighborhood and Belhaven college.... ...I think the Fairview is in the same position. They need to diversify that income in order to sustain those standards...of being an enrichment property that is a change agent in our city." (R.75-77).

3. Mr. Joe Haynes: "...[T]his is a treasure that his city needs to keep. Once you lose it, then it's gone." (R.77-79).

4. Mr. Don Ketner: "My wife Claire and I and our young children live at 917 Fairview, which is about ten houses or ten lots down from the Fairview Inn. ...I've been a Belhaven resident for seven years.... The proposed amendments that will allow the Fairview to operate a restaurant will not result in a commercial intrusion, in my opinion, into my neighborhood. And the restrictions that they've been willing to implement, such as not having a free-standing bar on the premises, as well as not serving alcohol anywhere except for the table during time which food is served.... And there will be no changes to the property, which the property is very compatible with the street where my family lives. And matter of fact, I think that its presence increases my property values." (R.79-81).

5. Ms. Dorothy Triplett: "I live at 1125 Monroe Street in Belhaven. ...[G]ranting Fairview the opportunity to provide fine dining without prior reservations...is good for the neighborhood. ...Parking is not and will not be a problem. ...No adverse precedent is being created. The Fairview already has a special use permit under R2 zoning. It will not change the zoning, just a portion of the language. ...It's about economic development. This is good not only for the neighborhood but for the City of Jackson and for the State of Mississippi. It would provide increased sales tax revenue and additional jobs and will attract business visitors and return visitors."

6. Ms. Wanda Wilson: "The Convention and Visitors Bureau lends their support.... Other neighborhoods have used the residential and business mix to offer added benefits, to increase their property values, and lure additional residents." (R.84-86).

7. Ms. Rose Snow: "...I represent Baptist Health Systems. ...from Baptist's perspective, we are very concerned about our neighborhood, which is Belhaven.... We worked with them when they wanted to create a walkway from the parking lot to the Fairview Inn so that people would not have to go out in the street, because they were concerned about how some of their neighbors felt about that." (R.86-87).

8. **Mr. Richard Freis:** "My wife Catherine and I have taught at Millsaps.... I live with my family in the townhouses on Oakwood, immediately adjacent to the Fairview Inn and its present parking area. We are the Inn's nearest neighbors. We have never been disturbed by any activity, daytime or evening, at the Fairview Inn in any way. ...We strongly support having the restaurant open.... It will enhance our lives and compliment the other efforts of Belhaven renewal by the Belhaven Improvement Association." (R.91-92).

9. **Mr. Mike Farrell:** "The board of directors [of the BIA] have voted to support this text amendment. We're very much in favor of it, although we had some on our board who had differing views. But we think that we reflect the sentiment in the neighborhood, which is overwhelmingly in favor of this amendment. ...Belhaven is not a bedroom community. ...We are an urban neighborhood, and it's different from a suburban neighborhood. And for us to grow and be vital, we have got to recognize that and make certain allowances. ...and now when they would like to serve meals without reservations, we only think that's a value-added asset to the Fairview, to our neighborhood, and to the City of Jackson." (R.93-96).

10. **Ms. Jo Ann Morris:** "I live at 801 Arlington, right around the corner from Fairview.They took a big, old house that would have fallen into disrepair and become Lord knows what, and they turned it into a community asset." (R.96-97).

11. **Ms. Pat Weir:** "...I own the property across the street at 745 Fairview. ...But you can't just go in to the Fairview Inn and have one person wanting dinner. ...And that's what I want to see. And I do own other properties. My broker owns about 75 in Belhaven. He could not be here today, but he is all for it also." (R.98-99).

12. **Mr. Carl Reddix:** "I would like the opportunity to spend more food tax in Hinds County. ...the community, it is the reason that all are us are so high on the Fairview Inn and the way that they intertwine in the community." (R.100-101).

13. **Ms. Toni Turner:** "My husband and I, Dr. William Turner, have depended upon the Fairview Inn to help in the recruitment of many new surgeons to the University Medical Center. ...it is an exceptional place in which to enjoy a meal. ...There has never been atmosphere of crowding or excess. The Fairview has managed such events graciously and effectively." (R.102-103).

14. **Ms. Kathryn McCraney:** "...I would like to represent ...a younger generation and a mother of two children, a husband that is a surgeon at the University Medical Center. ...wow what a great opportunity for me to walk with my husband's hand to dinner one night and walk home. We live on Poplar Street...." (R.103-104).

15. Mr. Chris Klotz: "...the Fairview is an historic building.... And we should be doing everything we can to encourage improvement of that facility, because that encourages our neighborhood. ...when the small group of objectors, a very vocal small group of objectors want to try to stop the Fairview's progress." (R.104-107).

16. Minister Sheila Davis: "And I said I've been in Jackson 44 years, and then this hidden treasure." (R.108-109).

17. Mr. William (Bill) Osborne: "...I'm a member of the BIA board.... I still think wow, a great restaurant for our neighborhood." (R.109-110).

18. Mr. Jim Kopernak: "Ann and I are real active in neighborhood matters...Belhaven and Belhaven Heights. ...we had the occasion to have those Main Street experts come in and speak to us. ...neighborhood vibrancy is about the business of blended uses, of blending commercial and residential use. That's the focus we need to have in Jackson. ...But the Fairview Inn is probably the best example of blended use that one could possibly imagine. It's truly a crown jewel. ...the Main Street Mississippi theme, revitalizing our neighborhoods with vibrancy, blended uses. ...This is a very modest proposal. ...This is intelligent management consistent with a vibrant neighborhood...." (R.111-113).

19. Ms. Shirley Vanderpool: "I've worked in tourism, promotion and marketing...for more than 40 years. ...I think that to disallow the potential of a thriving business of this kind to go on and succeed would be a detriment, both to the city and to the state." (R.113-115).

E. Public Comment by Citizens Opposed to Text Amendment 5

1. Heather Wagner: Ms. Wagner began by introducing into the record a detailed written statement of her objections to the text amendments (R.115-116). Ms. Wagner's statement consists of five typed, single spaced pages (R.446-450). Ms. Wagner's statement recites in full the City's Zoning Ordinance Section 1701-A on criteria for Use Permits and then argues that the amendments do not meet those criteria:

The operation of a restaurant in a residential district is an intrusive use, evidenced by the fact that under the zoning ordinance, a general restaurant is limited in all other cases to operation solely in C-3 commercial zones throughout the city." [R.446-447].

Her memo then argues that, "The proposed amendment is a thinly veiled attempt to retroactively legalize a current illegal use of the property" at Fairview, adoption of the amendments would

create a bad precedent by allowing a restaurant use in a residential area without a rezoning, and "Financial reasons should not be justifications for changes affecting land use." (R.447-450).

Ms. Wagner said she and her husband live at 1702 North State (R.116). As in her written statement, Ms. Wagner argued to the Council that adoption of the amendment allowing Fairview to have a restaurant would permit it "to operate a C3 use of a restaurant in a residential district...it does affect a current land use"; created a "presidential effect"; "could serve as evidence of change in character of the neighborhood"; and would change "the character of the immediate neighborhood". (R.115-120).

2. **Mr. Vaughn McRae:** "...My wife, four children and I live near Fairview at 1515 North State Street. ...First of all, your planning board considered all of the relevant facts heard from all these people, looked at the City's land use and voted against a change in the ordinance. ...Number 2, over 60 percent of the homeowners most affected by this change...oppose allowing a full-service hotel in their neighborhood. ..Number 3, Fairview's argued for change because of their difficult financial situation, yet they've not presented any evidence of this: tax returns, net worth statements, income statements. ...And Number 4.... I cannot think of one example where allowing commercial encroachment into a residential neighborhood has enhanced that neighborhood." (R.120-123).

3. **Ms. Anita Modak-Truran:** "I live with my family at 735 Fairview. In 1998 we moved to Jackson, Mississippi from Chicago, Illinois. ...It's about can we allow a residential area that has been historically that, to have a C3 business? My concern with having a liquor establishment, this is a full...bar that goes with meals. Now, I know that there's been some talk about can we maybe tailor it so that you only have drinks if you have a meal. ...You can't enforce something like that. ...And I simply cannot have my child to be a victim of a crime or of a congestion problem that occurs in a commercial district when we live in a residential area." (R.123-126).

4. **Mr. Mark Modak-Truran:** Attorney Mark Modak-Truran, who lives with his wife Anita at 735 Fairview Street, began by entering into the record a written statement in opposition to the text amendments (R.126). His written statement consists of seven (7) single spaced, type written pages plus 19 exhibits consisting of letters and signed petitions in opposition to the amendments together with earlier pictures of Fairview Street showing parking on the street

and deliveries to the Inn, for a total of 51 pages (R. 452-503). Mr. Modak-Truran then went on to complain that the text amendments as they affect the Fairview Inn would increase parking problems which "is definitely a problem in the day" and "they're definitely, I would, assume going to open for lunch."³ (R.127). He complained of "semi trailer trucks unloading in front of our house on the street", "motor coaches for the exhibit in town load and unload in front of our house in the street", and the "restaurant would only add commercial and industrial uses." (R.127-128).

F. Statements by City Council Members, Amendment For Site Plan Review, and Unanimous Vote in Favor of Text Amendment 5.

Following the public comments, Council member Margaret Barrett-Simon of Ward 7, which includes the Belhaven area of Jackson, made a statement:

In 1965 I moved back to Belhaven. I grew up there. ...Main Street [movement] is coming into Belhaven.... We have a lot of disposable income in Belhaven, but there's no place for us to spend it to keep our community. And one remark that was made at the Main Street meeting – and these were all professionals, real professionals who go around this country to advice communities. They said that unless we did something in this neighborhood right now to bring in mixed-use, blends, those sorts of things, and this – these are their words, "Belhaven is dwindling on the vine, and it is a matter of time." ...It is simply one question to be answered, and that is can they serve dinner to 50 people or fewer at night without a reservation. It was fine when it was treated as a private club; it's no longer fine. And so that's the issue. [R.130-134].

Then Council member Betty Dagner-Cook spoke:

...But I have been to several bed and breakfasts, and they operate a restaurant, and one of them is in Vicksburg, Cedar Grove. ...right in this residential area. And they park at the – at the place. ...I thought it was great. [R.137-138].

Council member Margaret Barrett-Simon moved for the adoption of Text Amendment 5, and council member Dagner-Cook seconded the motion. (R.142). The President asked for

³ A wrong assumption indeed. Because the adjacent 1600 medical building parking lot is not available during the week days, The Fairview Inn restaurant serves lunch only at Sunday Brunch. (R.227).

discussion. Council member Barrett-Simon then offered an amendment to Text Amendment 5 as to the existing Class B Inn, stating:

I would like to offer an amendment that that this will go before site plan so that we can resolve any traffic issues, delivery issues, that sort of thing.... ...I suggest you say, 'And site plan clearance from city staff. [R.143].

Ms. Fox then noted that, "The site plan review committee is made up of a number of city staff people already." (R.143). Council member McLemore then inquired of Ms. Fox whether the site plan review committee would "thoroughly review all the specifications?" and was assured by Ms. Fox that, "Yes, sir, it would." (R.144). Ms. Fox, in response to a request from Council member Brown for a clarification about the site plan review committee's task, said of the site plan review committee: "We will look at traffic/parking concerns and particularly the loading and unloading of the delivery trucks, the delivery vehicles." (R.145).

The Council then voted unanimously, five to zero (5-0) to approve Text Amendment 5 to the City of Jackson's Zoning Ordinance. (R.145-146).

SUMMARY OF THE ARGUMENT

As the Circuit Court's Opinion states, this Appeal of the City Council's adoption of Text Amendment 5, "is an appeal from a city council's legislative action" (Opinion, R.E. p.10). The applicable standard of review therefore starts with the recognition that the City's action "is a legislative rather than a judicial matter." *Fondren North Renaissance v. Mayor and City Council of City of Jackson*, 749 So.2d 974, 977 (Miss.1999). The question on appeal therefore is whether the Appellants can meet their burden to show that the City Council's legislative adoption of Text Amendment 5 was, "arbitrary, capricious, discriminatory, or is illegal, or without a substantial evidentiary basis" *Id.*; See also, *City of Ridgeland v. Estate of M.A. Lewis*, 963 So.2d 1210, 1214 (Miss.App.,2007). As the Court stated, "[o]therwise, the Mississippi Supreme Court has repeatedly held that 'the judicial department of this state has no authority to interdict either

zoning or rezoning decisions which may be said to be ‘fairly debatable’.” (Opinion, R.E. p.10, citing *New Albany v. Ray*, 417 So.2d 550, 552-53 (Miss.1982); *Drews v. City of Hattiesburg*, 904 So.2d 138, 140 (Miss. 2005); *Adams v. Mayor of City of Natchez*, 964 So.2d 629, 633 (Miss.App.2007); *Childs v. Hancock Co. Bd. Of Sup’rs*, 2007 WL 3257014, 2007 Miss.App. LEXIS 748 (Miss.App. Nov. 6, 2007).

Further, “[a]ppellate courts are to give deference to the zoning decision of the local governing board, as the decision is to be presumed valid.” *Estate of M.A. Lewis*, 963 So.2d at 1214. Also, the City Council, “is vested with the final authority for determining whether its procedural requisites have been met or, if it pleases, waiving them”. *Thrash v. Mayor and Commissioners of the City of Jackson*, 498 So.2d 801, 807 (Miss.1986). The Council thus had full discretion to modify the text of its existing ordinances on bed and breakfast use to set forth a procedure for an existing Class B Bed and Breakfast Inn permit holder to add a restaurant use under its existing Class B Inn permit.

Text Amendment 5 is a text amendment to the City’s zoning ordinances. Appellants have not shown that the procedure of Text Amendment 5 for the existing Class B Inn permit holder to add a restaurant use resulted in a *de facto* map amendment rezoning of 734 Fairview Street (The Fairview Inn) from R-2 residential zoning of the Inn with a restricted permanent use permit to an unrestricted “C-3 General Commercial District Restaurant”, or that there was any rezoning at all from R-2, much less illegal “spot zoning”. A Class B Bed and Breakfast Inn With Restaurant are reasonably distinguishable from a C-3 General Commercial District Restaurant, and retain all of the use restrictions applicable to a Class B Bed and Breakfast Inn. Text Amendment 5 is a modest proposal allowing an historic Class B Bed and Breakfast Inn to serve meals on a “non-reservations basis” to the public, as well as on a “reservations-only” basis as in the past to private functions. The Council member for the Belhaven neighborhood stated on the

record that adoption of Text Amendment 5 supports a public need to foster a mixed or blended use at the Fairview Inn of the kind that would contribute to the vitality of Belhaven as an urban neighborhood. (R.130-134). As the Court's Opinion states, "[t]here is evidence of public need in the record, and such evidence vitiates the 'spot zoning' argument." (Opinion, R.E. p. 17).

It was in the discretion of the City Council not to require the existing Class B Bed and Breakfast Inn permanent use permit holder to apply again for a use permit, or to go through a use permit hearing beyond the hearing the Council conducted for the adoption of Text Amendment 5. While not required, the City Council hearing in fact covered all of the criteria for a new use permit listed at Section 1701.02-A of the city ordinance. Both proponents and opponents of Text Amendment 5 participated in a vigorous debate over the Amendment's adoption. Both sides presented arguments of counsel, lengthy memoranda with exhibits, and public witnesses. The Council afforded due process to the Appellants, who received adequate notice of and participated fully in all stages of the debate over Text Amendment 5, both before the City Planning Board and the City Council. Indeed, the very thorough and intense nature of the public debate, including the presentation of the arguments of counsel for both sides, supported by memoranda, exhibits, and witnesses, produced a voluminous record that both sides contributed to. The record therefore demonstrates that Appellants cannot meet their burden to show that Amendment 5 was "not supported by substantial evidence", was "not fairly debatable", or was "arbitrary and capricious". Appellants simply failed to persuade the City Council after a full debate, resulting in a unanimous vote by the Council (5-0) on April 7, 2004, to adopt the Amendment. (R.159). This Court, therefore, on appeal must affirm the Opinion of the Circuit Court and of the decision of the City Council adopting Text Amendment 5.

ARGUMENT

I. STANDARD OF REVIEW

The City Council's adoption of Text Amendment No. 5 amending the City's 1974 Zoning Ordinance was "a legislative rather than a judicial matter." *Fondren North Renaissance v. Mayor and City Council of Jackson*, 749 So.2d at 977; Circuit Court Opinion, R.E. p. 3.

A rezoning or **amendment of a zoning ordinance** or refusal to rezone is generally characterized as a '**legislative' act representing legislative judgment.**

(Emphasis added). *Harvey v. Town of Marion*, 756 So.2d 835, 838 (Miss.App.2000).

It follows also that the Council's legislative act in adopting text amendments is entitled to a presumption of validity, not to be overturned if the issue presented by the amendment was at least "fairly debatable":

There is a presumption of validity of a governing body's enactment or **amendment** of a zoning ordinance and the burden of proof is on the party asserting its invalidity. *Id.* Where the point at issue is 'fairly debatable,' we will not disturb the zoning authority's action.

(Emphasis added). *Carpenter v. City of Petal*, 699 So.2d 928, 932 (Miss.1997); *Board of Aldermen, City of Clinton v. Conerly*, 509 So.2d 877, 885 (Miss.1987); Opinion R.E. p.8.

Indeed, the Circuit Court's review of the City's text amendments is limited: "...the judicial department of the government of this state has no authority to interdict either zoning or rezoning which may be 'fairly debatable.'" *Fondren North Renaissance v. Mayor*, 749 So.2d at 977. Further:

... an appellate court reviewing a zoning matter is limited in its judicial review and may not perform a de novo review. [citations omitted]. In reviewing a decision of the Mayor and Board of Aldermen, appellate courts 'should respect such findings unless they are arbitrary, capricious, and unreasonable.' [Citations omitted]. Appellate courts are to give deference to the zoning decision of the local governing board, as the decision is to be presumed valid. [Citation omitted]. **The burden is upon the party seeking to set aside the decision to show that it was arbitrary, capricious, discriminatory, illegal, not supported by substantial evidence, and not fairly debatable.** [Citation omitted]. **The**

meaning of the term ‘fairly debatable’ is the antithesis of arbitrary and capricious.’ *Id.* It follows, then, that ‘[i]f a decision is one which can be considered fairly debatable, then it cannot be considered arbitrary or capricious.

(Emphasis added). *City of Ridgeland v. Estate of M.A. Lewis*, 963 So.2d 1210, 1214 ¶9 (Miss. App. 2007). See also, *Ridgewood Land Company v. Moore*, 222 So.2d 378, 379 (Miss.1969) (“The reviewing court should not attempt to substitute its judgment for that of the municipal governing body.”); *Lewis v. City of Jackson*, 184 So.2d 384 (“...all presumptions must be indulged in favor of the validity of zoning ordinances.”).

Section 1 of Text Amendment 5 is purely a legislative act of the City Council since it simply modifies the text of the City’s ordinances to add a definition of a new use (adding Section 202.17(a)), a Class B Bed and Breakfast Inn With Restaurant.

Section 2 of Text Amendment 5 is also legislative in amending the City’s ordinances to add language (as Section 602.02.03) stating that, “It is expressly understood that a separate Use Permit is required to operate a restaurant in a Class B Bed and Breakfast Inn.” (R.158).

Appellants argue that the remaining portion of Section 2 of Text Amendment 5 at least is adjudicative rather than legislative since it addresses any existing Class B Inn permit holder’s addition of a restaurant use. Appellants state that the proponents of the adoption had to show that the City’s criteria for the grant of a new use permit set forth in the City’s zoning ordinance at Section 1701.02-A were met as to the existing Class B Inn use permit holder. That would be the case if this Court on appeal were reviewing the City’s grant of an application for a new use permit for a new applicant to operate Class B Bed and Breakfast Inn With Restaurant. See, e.g., *Beasley v. Neelly*, 911 So.2d 603, 607, ¶8 (Miss.App.2005).

However, this appeal involves not a new permit application but the legislation of a procedure for an existing Bed & Breakfast use permit holder to add an additional use under its

existing permanent use permit. The text of Section of 2 of Text Amendment 5 establishes a procedure allowing, “[a]ny existing Class B Bed and Breakfast Inn” permit holder wishing to operate a restaurant “in conjunction with their Class B Bed and Breakfast Inn” to do so by “by right” by meeting two stated conditions. The conditions are : 1) the provision for the City’s “receipt of a statement indicating this election”, and 2) the meeting of “a requirement that a Bed and Breakfast Inn with Restaurant clear site plan review from City Staff.” (R.158). The City’s amendment of its ordinances provides a different procedure for “[a]ny existing Class B Bed and Breakfast Inn” permit holder to add a restaurant use under its existing Class B Inn use permit as a matter of right, without having to repeat the permit application procedure for a new use permit, or go through a repetitive hearing in addition to the hearing on the adoption of the amendment (at which the existing permit holder and its objectors were present to debate the provision for the existing permit holder). The Council’s adoption of the procedure was a reasonable text amendment decision within the City’s legislative discretion to regulate Class B Inns. It was not an adjudicative act of a landowner’s application for zoning map amendment or even for a new use permit. It was a legislative act establishing the criteria and standards of consideration for an added bed and breakfast use to an existing Inn. Further, since the Appellants did not appeal the subsequent action of the Site Plan Review Committee as to the existing permit holder, and no record of their proceedings appears in the present record before the Court, this Court is not called upon to determine whether or not The Fairview Inn met the two conditions.

Rather, again, the standard of review for the City Council’s adoption of Text Amendment 5 in its totality, including the provision relating to “[a]ny existing Class B Bed and Breakfast Inn” use permit holder, is whether the Appellants can meet their burden:

The burden is upon the party seeking to set aside the decision to show that it was arbitrary, capricious, discriminatory, illegal, not supported by substantial evidence, and not fairly debatable. [Citation omitted]. The meaning of the term

‘fairly debatable’ is the antithesis of arbitrary and capricious.’ *Id.* It follows, then, that ‘[i]f a decision is one which can be considered fairly debatable, then it cannot be considered arbitrary or capricious.

(Emphasis added). *City of Ridgeland v. Estate of M.A. Lewis*, 963 So.2d at 1214.

The presumption of reasonableness certainly applies to the legislative adoption of the text amendments to the zoning regulations since “zoning ordinances are presumed reasonable and for the public good.” *Town of Florence, Miss. v. Sea Lands, Ltd.*, 759 So.2d 1221, 1227

(Miss.2000); Opinion R.E. p.3.

The City’s discretion to choose what the procedures it would adopt for the existing Class B Inn permit holder to obtain a restaurant use was committed to the, “authority of the Jackson City Council in its legislative authority”. *Thrash v. Mayor and Commissioners of the City of Jackson*, 498 So.2d 801, 808 (Miss.1986). As long as the City Council of Jackson provided the Appellants due process rights of prior notice and a hearing for the adoption of Text Amendment 5, the City was entitled to discretion in, “determining whether its procedural requisites have been met or, **if it pleases, waiving them.**” (Emphasis added). *Thrash*, 498 So.2d at 807.

In *Thrash* the objectors claimed that the City of Jackson failed to follow certain of its ordinances in a zoning matter because it approved a zoning application that, “failed to set out in detail” evidence for the rezoning as required by one ordinance, “there was a failure to submit proper site and development plans for consideration” required by another ordinance, the zoning committee held a hearing with less than a quorum, and there were certain procedures not followed required by ordinance, “in connection with the appeal of this matter to the Jackson City Council”. Nonetheless the Mississippi Supreme Court stated it would not look behind the City’s handling or waiver of its procedures so long as due process was afforded to the objectors:

The City, in its brief, not surprisingly, denies that there were any such procedural irregularities. The operative question, however, is not so much that as it is identification of the proper authority for deciding whether there were any such

procedural irregularities. Here again we reiterate that zoning is a legislative function and that the City Council and its City Planning Board function in a legislative capacity. The procedural rules and regulations found in the City Zoning Ordinance are in aid of the City's performance of its legislative zoning function. With two exceptions to be noted below, it is the City which is vested with final authority for determining whether its procedural requisites have been met or, if it pleases, waiving them. [Citations omitted].

The first exception concerns those cases wherein the municipal zoning authorities may be said to have transgressed some important limitation or procedure imposed by state law. [citations omitted]. **None of Objectors' procedural complaints fall within this exception, as each is premised solely upon the Zoning Ordinance of Jackson, Mississippi, adopted May 29, 1974, as amended.**

The other exception appears where the procedural deficiencies may be said to have contravened a citizen's due process rights.

...We find nothing in the record or the briefs remotely suggesting a contravention of due process secured to the Objectors. **Whether there was compliance with other procedural rules not implicating due process considerations is a matter committed to the authority of the Jackson City Council in its legislative capacity and not subject to review here.** These assignments of error are denied.

(Emphasis added). *Thrash*, 498 So.2d at 807-808.

Thus, the issue on appeal is not whether the City Council had the discretion through Amendment 5 to require the existing Class B permit holder to go through the Site Plan Review Committee process rather than a new use permit application and hearing process. The record is clear that the City Council's actions were reasonable, that it received a great deal of evidence and heard a great deal of debate concerning the track record of the existing permit holder's provision of fine dining to social gatherings and lodgers over the prior eleven (11) years since 1993 on a "reservations only" basis, and fully considered the evidence as to what could be expected from the existing Class B Inn's provision of meals on a "non-reservations" basis as well. The City Council's decision as to the handling of procedures under its ordinances was, "a matter committed to the authority of the Jackson City Council in its legislative capacity and not subject to review here." *Thrash*, 498 So.2d at 807-808.

Instead, the question on review is simply whether the Appellants can meet their burden to show that the legislative adoption of Text Amendment 5 was “not supported by substantial evidence”, was “not fairly debatable”, was “arbitrary and capricious”, or that the City Council failed to afford the Appellants due process to be present at and engage in the public debate over the adoption of the Amendment. *Fondren North Renaissance v. Mayor*, 747 So.2d at 977; *City of Ridgeland v. Estate of M.A. Lewis*, 963 So.2d at 1214.

Also, the Appellants cannot meet their burden to show that the City Council’s adoption of Text Amendment 5 is “not supported by substantial evidence,” by asking, “this Court to re-weigh the evidence”, for “[t]his is not the appropriate standard of review.” *Kuluz v. D’Iberville*, 890 So.2d 938, 943, ¶10 (Miss.App.2004). Further, “...we will not reverse for a lack of such specificity [by specific findings] where a factual basis for the action is disclosed by the record.” *Faircloth v. Lyles*, 592 So.2d 941, 945 (Miss.1991); Opinion, R.E. p.7.

As we will see in further detail below, clearly the City Council’s legislative adoption of the amendment was supported by substantial evidence, was fairly debatable, and was, consequently, not arbitrary or capricious. Also, the Council did afford due process to the Appellants, attorneys all, who received both actual and published notice and who appeared, spoke and introduced detailed positions statements and documentation into the record at every stage of the public proceedings.

II. TEXT AMENDMENT 5 IS A TEXT AMENDMENT, NOT A MAP AMENDMENT OR DE FACTO REZONING OF 734 FAIRVIEW STREET FROM R-2 TO C-3, AND DID NOT RESULT IN ILLEGAL “SPOT ZONING”

A. Text Amendment 5 is a Text Amendment, Not A De Facto Map Amendment Rezoning to an Unrestricted C-3 General Commercial District Restaurant

Appellants argue that the City Council illegally adopted Text Amendment 5 in what amounts to a “map amendment” to the City’s zoning ordinance that illegally rezoned The

Fairview Inn's property. The Appellants assert the Council in effect rezoned 734 Fairview Street from a restricted permanent use permit for a Class B Bed and Breakfast Inn under R-2 zoning to an unrestricted "General Restaurant" use appropriate only to a C-3 General Commercial District. That is clearly not the case.

As the Circuit Court stated in its Opinion:

This case, however, does not involve an applicant seeking such a [rezoning] change. William and Carol Simmons, owners and operators of the Fairview Inn, a bed-and-breakfast establishment, did not file any such application. The subject matter here was initially brought before the Jackson City Planning Board at the instance of one or more members of the Council (R.361).

Opinion, R.E. pp. 4-5. Nor was there any reason for the existing Class B Bed and Breakfast use permit holder to apply for a rezoning.

First, Text Amendment 5 is a "text amendment" meeting the requirements of the "Procedure for Text Amendments" provided for by the City of Jackson's zoning ordinance (at Section 1704-A). The ordinance allows the City to adopt a "text amendment" to its zoning ordinances following the publication of notice and a public hearing. *Id.* By contrast to a "text amendment", a "map amendment" under the City's zoning ordinance is "rezoning" for which there is an application requirement that includes a showing in the application of sufficient evidence to meet the "change and need" criteria. Ordinance Section 1703.02.1-A. No such "change and need" criteria for "rezoning" appear as a condition to a "text amendment" under the text amendment ordinance, Section 1704-A, or even for a new use permit under Section 1701.02-A. The only conditions required for a "text amendment" are publication of notice and a public hearing, "before the City Planning Board and/or City Council". Section 1704.02-A.

Second, the City's zoning ordinance defines a General Restaurant broadly in a way that distinguishes a General Restaurant under C-3 from the much more restricted Class B Bed and

Breakfast Inn With Restaurant use permit defined by Text Amendment 5 under R-2 zoning. The City's ordinance states of General Restaurant uses:

...food may be prepared for carry-out sale to walk-in customers. A general restaurant may include live entertainment. Typical uses include restaurants, dance halls, discotheques, lounges, and other businesses that combine both a food and beverage operation with entertainment (i.e. dance floor or pool table).

Ordinance Section 202.143. The City Council included no such language in Text Amendment 5. Indeed, in the case of the existing Class B Inn, it would be hard to confuse the restricted fine dining permitted at the lovely, historic Fairview Inn, the "Most Outstanding Inn in North America and the Caribbean" (R.322-324), with "dance halls, discotheques, lounges....." or a place for "carry-out sale to walk-in customers." Unlike "dance halls, discotheques, lounges", The Fairview Inn has no free standing bar where patrons can hover around just to order drinks. Rather, by the requirements of the Amendment beverages are to be consumed strictly at the same table where meals are served, "nor given the unique ambiance and elegance of Fairview as an historic Inn, would we ever want such an operation at the Inn." (R.228-229).

Third, in all cases a Class B Inn With Restaurant as defined by Text Amendment 5 is still subject to all the strict general requirements for a Class B Inn: a location in "an owner-occupied dwelling which is the primary residence of the owner", listed on the National Register of Historic Places (as The Fairview Inn is, R.228), or designated or eligible for designation as a Jackson Landmark by the Historic Preservation Commission, with overnight lodging available. Ordinance Sections 202.17, 602.3 (3). A Class B Inn with a use permit must also provide proof to the City's Zoning Division annually of adequate off-street parking (by filing a lease agreement or deed). Section 603.3 (3)(b). A Class B Inn must also direct all exterior lighting "away from adjacent residential property". Section 603.3 (3)(c). No such restrictions attend a General Restaurant located in a C-3 General Commercial District. The strict requirements and tight

controls for a Class B Bed and Breakfast Inn With Restaurant also contrast sharply with the other kinds of restaurants Appellants point to, including fast food restaurants, neighborhood restaurants, neighborhood shopping center restaurants, and overlay district restaurants. None of those categories are confined to a location within a legally designated National Register or Jackson Historic Commission eligible or designated historic, owner-occupied residential dwelling. None of those categories necessarily have the off-street parking and lighting restrictions of a Class B Inn. None of those categories of use are limited to operation within a specifically approved site plan under a restricted use permit (R.340,342,344).⁴ The Council's adoption, by text amendment, of the Class B Bed and Breakfast Inn With Restaurant definition is reasonably distinguished from other kinds of restaurants allowed by the Zoning Ordinance in commercial settings. The Council's adoption of the definition for a Class B Inn With Restaurant was therefore a reasonable and lawful legislative adoption of a restricted use within the City Council's sound discretion.

Fourth, the very point that the existing use permit holder made, as the Circuit Court observed, was that the addition of an Inn Restaurant to its existing dining room to allow non-reservations dining in addition to reserved functions already taking place there posed no change to the character of the Belhaven neighborhood:

However, appellants and others objecting to the amendments argued that there had been no change in the neighborhood which would justify any amendment to the existing ordinance. Paradoxically, that was the very point Fairview made before the City Council. It was the only holder of the Class "B" use permit authorized by Section 202.17, and hoped to operate a restaurant in the same dining facilities in which it was already serving lodgers of the bed-and-breakfast, as well as guests of receptions, weddings, and other social functions.

⁴ The 1993 Inn Use Permit for The Fairview Inn and each of two amendments states it is, "granted only for the site plan approved by the Site Plan Review Committee". (R.340, 342,344).

Opinion, R.E. pp. 5-6. Indeed, picture introduced of the Inn and its dining facility show that the addition of the Restaurant use to the existing Inn created no change to the Inn visible from the exterior of the Inn and no change to its parking needs or arrangements (see R.247-251). Thus, Appellants' citations to rezoning cases requiring the showing of a change in the character of the neighborhood are in this case (Modak-Truran Brief, pp. 25-27). The owners of an Inn neither applied for nor requested any rezoning from the existing R-2 designation, and there was no rezoning or reclassification of zoning of property by Text Amendment 5. The zoning for the historic Fairview Inn remained R-2 Residential with a restricted permanent use permit for a Class B Bed and Breakfast Inn following the adoption of Amendment 5. Also, the City's ordinances do not require a showing of a change in the character of the neighborhood even for an application for a new use permit, much less for an added use under an existing use permit as Amendment 5 simply provides a procedure for. None of the criteria for a new use permit listed in ordinance Section 1701.02-A include a showing of change in neighborhood character.

The Council received much substantial evidence, though, showing that adoption of Amendment 5 would satisfy a public need. Council member Margaret Barrett-Simon in her speech to the Council, following consideration of all the evidence, described with passion the public need in Jackson for Amendment 5 to meet the recommendations of planning experts of the Main Street movement to the City of Jackson. Text Amendment 5, she found, would foster a mixed or blended use at The Fairview Inn of the kind that would contribute to the vitality of Belhaven as an urban neighborhood. (R.130-134).

B. Text Amendment 5 Creating A Procedure for An Existing Class B Bed and Breakfast Inn Permit Holder to Obtain a Restaurant Use Did Not Create Illegal "Spot Zoning" For the Historic Fairview Inn

(1) Allowing the Existing B&B Permit Holder to Obtain the Additional Use of an Inn Restaurant is Compatible With the City of Jackson's Comprehensive Land Use Plan.

The City Council's adoption of Text Amendment 5 did not involve either a *de facto* or actual rezoning at all, but only the adoption of a procedure for the existing Class B Inn to seek to add a restaurant use under its Class B Inn use permit by obtaining a clearance from the City Site Plan Review Committee. The Fairview Inn remained the principal residence of its owners and a restricted Bed and Breakfast use within R-2 residential zoning following the Council's action.

Further, since the property of the Fairview Inn with a restaurant remains a R-2 residential B&B Inn with a restricted permanent use permit, it remains in harmony with the City's comprehensive land use plan that allows use permits within a R-2 area for an historic Class B Bed and Breakfast Inn. (R.229). Since Text Amendment 5 was in harmony with the City's comprehensive land use plan it could not represent illegal "spot zoning." As the Supreme Court stated in *Fondren North Renaissance v. City of Jackson*, 749, So.2d 974, 979 (Miss.1999):

'Spot-zoning' is a term used by the courts to describe an amendment which is not in harmony with the comprehensive or well-considered land use plan of a municipality. [Citation omitted]. Consequently, it is not spot-zoning when an ordinance or amendment is enacted in accordance with a comprehensive zoning plan.

Accord., *McWalters v. Biloxi*, 541 So.2d 824, 828 (Miss.1991); Opinion, R.E. p.8.

The proponents of the text amendments put on substantial evidence that the City's adoption option of Text Amendment 5 was in keeping with the City's comprehensive land use plan since the procedure it provided for the existing Class B Inn permit holder to add an Inn restaurant use would: 1) retain the existing R-2 Residential zoning for the existing Class B Inn, 2) would involve no rezoning of the Fairview Inn, and 3) would be under the existing permanent use permit for the Inn within a residential district in keeping with the City's comprehensive land use plan and ordinances that already allow use permits for a Class B Bed and Breakfast Inn within the context of R-2 residential zoning. (R.57-58, 71, 229). Therefore, the provision of

Text Amendment 5 of a procedure for an existing Class B Inn to seek restaurant use did not involve “spot zoning”. See also, *Ridgewood Land Company v. W.J. Simmons*, 137 So.2d 532, 538 (Miss.1962) (“...although a zoning ordinance or amendment creates in the center of a large zone a small area or a district devoted to different use, it is not spot zoning if it is enacted in accordance with a comprehensive zoning plan.”).

The case of *Mayor and Bd. Of Aldermen v. Hudson*, 774 So.2d 448, 452 (Miss.App.2000) deals specifically with the charge of spot zoning for a conditional use, is stating:

A permit for a conditional use variance does not necessarily infer or create the notion that spot-zoning has or is occurring. The permit granted by the Board in this case neither alters the previous zoning designation of R-1 nor does it allow deviation from the restrictions which accompany said designation. Conditional use permits specifically limit the use of the property to those restrictive uses granted by the Board and are allowed by the zoning ordinance of the City of Clinton.

(Emphasis added). Similarly, the ordinances of the City of Jackson have long allowed for the grant of use permits for Class B Inns within residential R-2 districts as shown by The Fairview Inn’s having had one for eleven years since 1993. (R.54-55). Allowing for a procedure by Text Amendment 5 for the Inn’s dining areas to include a “non-reservations restaurant” as well as “reservations only” social functions and dining for lodgers does not change the Inn’s status as an historic, residential Class B Bed and Breakfast Inn with a use permit within R-2 zoning confined to an approved site plan in harmony with a residential setting. Text Amendment 5, therefore, is not a departure from the current city comprehensive land use plan and ordinances that permit a Class B Inn to operate in a R-2 residential district under a use permit and approved site plan. Further, all of the restrictions that keep the existing Class B Inn’s operations limited to its present historic Inn premises remain in place and are not changed, including the restrictions applicable to the existing Class B Inn’s physical premises and approved site plan. Therefore, the adoption of

Section 2 of Amendment 5 did not create illegal “spot zoning”, or indeed any rezoning at all.
Hudson, 774 So.2d at 452.

(2) The Circuit Court Properly Found that Evidence of Public Need For Text Amendment 5 Vitiates the Charge of “Spot Zoning”.

The Circuit Court specifically found: “There is evidence of public need in the record, and such evidence vitiates the ‘spot zoning’ argument.” Opinion, R.E. p. 10. Indeed, even had the amendment created a rezoning (which it did not), or was inspired by the Belhaven community’s need to preserve the Fairview Inn, “[t]he mere fact that an area is small and is zoned at the request of a single owner and is of greater benefit to him than to others **does not make out a case of spot zoning if there is a public need for it or a compelling reason for it.**” (Emphasis added). *Cockrell v. Panola County Board of Supervisors*, 950 So.2d 1086, 1097 at ¶28 (Miss.App.2007). The Court of Appeals, e.g., has held that public need can include “receipt of tax revenue” from and “reputation and importance” of a restaurant “as a tourist attraction”. *Adams v. Mayor of City of Natchez*, 964 So.2d 629 at 635 ¶19 (Fat Mama’s Tamales in Natchez).

The City Council, like the Planning Board before it, heard from Belhaven neighborhood residents who stated that there was a compelling public need for the adoption of Text Amendment 5’s provision allowing the existing use permit holder, the historic Fairview Inn, to add a restaurant use upon Site Plan Review approval from the City:

Stratton Bull, Belhaven Improvement Association (BIA) President:
“Belhaven is a mixed-use neighborhood to some extent, and we feel like this might be or could be an opportunity to sort of enhance...mixed uses in a neighborhood.” (R.373-374).

Mike Farrell, BIA Board: “...and now when they would like to serve meals without reservations, we only think that’s a value-added asset to the Fairview, to our neighborhood, and to the City of Jackson.” (R.93-96).

Richard Freis: “It will enhance our lives and compliment the other efforts of Belhaven renewal by the Belhaven Improvement Association.” (R.91-92).

State Senator John Horhn: "...[T]his proposed text change should be approved, and I think of five reasons. Number 1, it creates jobs in the city; Number 2, it generates tax dollars; Number 3, it creates dollar turnover. And this property is a major enhancement to Jackson's high-end accommodations and amenities. ...If you say that Jackson doesn't need this, I say you are wrong. It generates excellent public relations from which the City of Jackson benefits without spending one red cent. ...And I submit to you that these items are in harmony with where Jackson needs to go. And it does so without changing zoning....without disrupting the quality of life in one of Jackson's most stable neighborhoods. ...The Belhaven Neighborhood Association is in favor of this. There are 44 slots on site, there are 106 sites immediately adjacent to the property. Parking is not a problem. ...we're trying to create a tourism environment. I'm working ...at the state senate right now trying to assure we get...the best amenities that we can offer to visitors "(R.71-73).

Belhaven College President Roger Parrott: "...I believe it is an enrichment property for our city that could not be replaced. ...[I]t's expensive especially to do it in historic buildings. ...[I]n the last eight years we have put millions and millions of dollars into the Belhaven neighborhood and Belhaven college.... ...I think the Fairview is in the same position. They need to diversify that income in order to sustain those standards...of being an enrichment property that is a change agent in our city." (R.75-77).

Don Ketner: "My wife Claire and I and our young daughter live at 917 Fairview, which is about ten houses or ten lots down from the Fairview Inn. ...And there will be no change to the property.... And matter of fact, I think that its presence increases my property value." (R.79-80).

Jim Kopernak: "This is a very modest proposal. ...This is intelligent management consistent with a vibrant neighborhood...." (R.111-113).

Pat Weir: "And I do own other properties. My broker owns about 75 in Belhaven. He could not be here today, but he is all for it also." (R.98-99).

Wanda Wilson: "The Convention and Visitors Bureau lends their support.... Other neighborhoods have used the residential and business mix to offer added benefits, to increase their property values and lure additional residents." (R.84-86).

Ms. Shirley Vanderpool: "I've worked in tourism, promotion and marketing...for more than 40 years. ...I think that to disallow the potential of a thriving business of this kind to go on and succeed would be a detriment, both to the city and to the state." (R.113-115).

Following the presentation of public comment, Council member Margaret Barrett-Simon gave an impassioned speech to the City Council in favor of the text amendments that detailed her

reasoning. Ms. Barrett-Simon has lived most of her life the Belhaven neighborhood and is the City Council member for Ward 7 that includes Belhaven and Fairview Street (R.130). Ms. Barrett-Simon found that passage of Text Amendment 5 would provide a process to meet a public need for mixed or blended residential/commercial uses compatible with the residential character of Belhaven, an urban neighborhood. Indeed, she found that Text Amendment 5 addresses the recommendation to the City by urban planning experts with the Main Street movement calling for mixed uses that would strengthen the Belhaven neighborhood's vitality. She found:

In 1965 I moved back to Belhaven. I grew up there. ...Main Street [movement] is coming into Belhaven.... We have a lot of disposable income in Belhaven, but there's no place for us to spend it to keep our community. And one remark that was made at the Main Street meeting – and these were all professionals, real professionals who go around this country to advise communities. They said that unless we did something in this neighborhood right now to bring in mixed-use, blends, those sorts of things, and this – these are their words, “Belhaven is dwindling on the vine, and it is a matter of time.

...we just had this past week, Ms. Welty's house is open as a museum.... We had Pinehurst Place, our main thoroughfare, blocked off for three days. ...Are we going to no oppose Ms. Welty's museum? Are we going to oppose tour buses that came back and forth by my house over and over.... No, I hope not. I hope not. [R.130-134].

The Circuit Court, citing Council person Barrett-Simon's statement of her meeting with the Main Street representatives and their expression of the need to bring in more blended uses into Belhaven for the vitality of the neighborhood, noted:

Moreover, Council members could legitimately relate and consider their own common knowledge and familiarity with the ordinance area. [Citing *Faircloth v. Lyles*, 592 So.2d 941, 945 (Miss.1991)]. Unlike the situation in *Childs v. Hancock Co. Bd. Of Sup'rs*, ---So.2d ---,2007 WL 3257014 (Miss.App.2007)], that this was done in the case *sub judice* is borne out by the record.

Opinion, R.E. pp. 9-10.

Ms. Barrett-Simon also made the finding that the only real change in use for the Fairview Inn from reserved social gatherings and functions would be that The Fairview Inn's fine dining would become available to the public without the necessity of a prior reservation. She stated that it was unreasonable for the objectors to be alarmed by that fact:

...It is simply one question to be answered, and that is can they serve dinner to 50 people or fewer at night without a reservation. It was fine when it was treated as a private club; it's no longer fine. And so that's the issue. [R.133-134].

The Circuit Court properly concluded from the substantial evidence on the record of public need:

All of this constituted a factual basis upon which the Council could determine a public need for the amendments. ...Coupled with the presumption afforded in favor of a governing board's determination, this Court is of the opinion, and so finds, that there is substantial evidence in the record making the Council's decision concerning public need at least 'fairly debatable.' Consequently, even if the Court considered the City's action to constitute re-zoning, as opposed to text amendments, '[t]he mere fact that an area is small and is zoned at the request of a single owner and is of greater benefit to him than to others does not make out a case of spot zoning... [Citing *Cockrell v. Panola Co. Bd. Of Sup'rs.*, 950 So.2d at 1096]. ...There is evidence of public need in the record, and such evidence vitiates the 'spot zoning' argument. The fact that there was evidence to the contrary is immaterial, for it is not within the power of a special master or this Court to weigh anything in an appeal of this nature.

...[Ft.n. 38] Nor is the Court concerned that Fairview is the only bed-and-breakfast Inn to currently benefit from the amendments, for a statutory consideration for any zoning decision is *future* needs as well as current. MISS. CODE ANN., Section 17-1-11. There is nothing about the amendments that would keep future qualifying bed-and-breakfast establishments from also reaping the benefits. If anything, the amendments should encourage such future establishments.

Opinion, R.E. pp. 10-11.

In the end the City Council vote to approve Text Amendment 5 was unanimous. The Appellants simply failed to persuade the Council in the face of all the substantial evidence in the record showing a public need for the adoption of Text Amendment 5.

(3) The Circuit Court Properly Found that Adoption of Text Amendment 5 For Neighbors of the Fairview Inn Posed No Change or Alteration In the Use of Their Own Properties and that Text Amendment 5 Was Not A Rezoning or "Spot Zoning".

The Circuit Court noted a certain irony in the case because counsel for the Fairview Inn did not seek to justify Text Amendment 5 by arguing a neighborhood change; quite the opposite, as the Court stated:

...[W]e now focus on what evidence appears in the record upon which it could determine that changes in the neighborhood justified changes in the zoning amendments. This will not long occupy us, for there is no such evidence whatsoever. Ironically, but crucially, that was the very argument made by Fairview's attorney before the City Council.

Opinion, R.E. p. 11. The argument of Fairview's attorney before the City Council was:

Crane Kipp: "Fairview Inn has had a use permit to exactly this since 1993 and has been having wedding receptions and social gatherings ever since then. That's nothing new. [Fairview] needs to look at other ways to deal with supporting the property.

Dinners are a way. Wedding receptions have fallen off. That's a fact that's occurred.... In addition, wedding receptions, which they are authorized to do and have been authorized to do for 11 years now, are big events, and they draw a lot of people into the neighborhood. Dinner in the evenings will draw many fewer people [than wedding receptions] and they will be – it will be much more manageable. And they can all stay in the parking lot so no one has to be on the street...." [R.54-55].

The comprehensive land use plan for this city calls for the Belhaven neighborhood to be R -- to be residential. This is residential. That zoning is not changing. This is R2 property with a special use – with a use permit, a permanent use permit, which allows it to remain residential and retain its residential character.

It requires that the owners that have a bed and breakfast Class B, it requires that to be owner-occupied. The owners do occupy the house as do their guests.

The regulations permitting use – such uses in an R2 district are what are proposed to be amended today. Not the zoning, just the regulation of bed and breakfasts. And therefore there is no zoning change.

It's not spot zoning because R2 is an indicated land use in a neighborhood – in the Belhaven neighborhood in the City's comprehensive land use plan. And also, the

owners of the Fairview Inn own an interest in the 1600 [Baptist Medical] building next door, because they have a lease on the parking lot. [R.57-58].

The 1600 building and the parking lot and the rest of the properties along that street in the comprehensive land use plan are part of the North State Street corridor, which is – which is fundamentally a commercial zone.

The 1600 [Baptist Medical] Building is, for your information if you don't know it, contiguous to the Fairview Inn, and there is, in fact, now a gate and steps leading from the parking lot to the Fairview Inn to make the traffic not go out on to the street and essentially intrude in the neighborhood.

...There is not going to be any harm to the neighborhood. ... – the parking has been dealt with. The traffic has been dealt with. **And there is no change in this neighborhood from what has been going on.** [Emphasis added]. [R.54-60].

The “irony” that the Circuit Court Opinion picks up on reflects its reading of *Mississippi Manufactured Housing Association v. Board of Supervisors of Tate County*, 878 So.2d 180 (Miss.App.2004). In *Mississippi Manufactured Housing* an association of manufactured housing sellers and manufacturers sought to challenge an amendment to a county zoning ordinance prohibiting manufactured housing in the future in certain areas. The Court upheld the county's amendment of its zoning ordinance even in the absence of evidence of area change, stating:

MMHA asserts the ‘change or mistake’ rule out of context. Typically, the ‘change or mistake rule’ is applied when landowners object to a political entity's decision to re-zone, or not re-zone, individual pieces of property they own. ...in the present case, the revision of the comprehensive plan and the amendment of the zoning ordinance did not alter any present use of land within Tate county. Rather...the amended ordinance ‘grand fathered in’ any existing non-conforming presence of manufactured housing.... ...Therefore, this case does not present any landowner asserting that the board amendment of its zoning ordinance deprives him of the use of his property.

The **irony** of MMHAs legal position is that it is literally true that Tate County did not show a specific change in the character of any area of the county; however, this is only true because **there is no showing that the amendment resulted in any property owner having the current use of his property altered. The amended zoning preserved all current property uses.**

(Emphasis added; italics original). *Id.* at 186-187.

The Circuit Court noted that here:

It is clear that Belhaven was, *and remains*, zoned R-2. Fairview Inn is located...near the corner of Fairview Street and North State Street. The owners, in fact, lease a parking lot from Baptist Health Systems adjacent to the latter's commercial building situated at 1600 North State Street (at the corner of Fairview Street) and part of the North State Street commercial corridor. The parking lot abuts the Fairview property and connects with the bed-and-breakfast via a gate and steps (R.229, 253-63). [See also pictures 246-250 and plot plan, 253-255]. According to Fairview, this significantly diminishes the amount of traffic going and coming on Fairview Street, as short as that distance is from North State Street, and entering the neighborhood (R.58-60). Moreover, as pointed out by Fairview's attorney, because of the decline in high-volume business, such as weddings and receptions, Fairview's shift to serving fifty or less patrons at a time as a restaurant would diminish, rather than increase, parking, traffic and other concerns.

Mr. Modak-Truran, one of the appellants herein, and who lives across the street from the Fairview Inn, informed the Council of the problems he and his wife had already experienced with semi-trailer trucks unloading on the street in front of their home. He produced photographs showing cars of patrons lining both sides of Fairview Street, stating, 'Parking is definitely a problem in the day.' (R.127). Mr. Dan Baker shared similar information. These were all problems encountered *before* passage of the amendments.

(Emphasis original). Opinion, R.E. pp. 11-12.

The Fairview Inn made a number of such points in detail in its written statement to the Council. Whatever the Modak-Trurans may think about parking "in the day", day time parking is unaffected by the Inn restaurant which operates only at night and on weekends:

Fairview Statement: "Fairview has no plans to offer fine dining during the weekday noon hour since its parking lease for the lot of the 1600 Plaza Building next door covers only nights and weekends." (R.227).

The Inn's Statement further detailed the absence of neighborhood change:

"The Fairview Inn, an owner-occupied proprietorship, has held a permanent use permit as a Class B Inn since 1993 that allows Fairview to serve meals to lodgers, guests or receptions or other social gatherings. The text amendments would allow Fairview, which can offer fine dining now to 'social gatherings' on a day-ahead, reservations-only basis, to elect to offer and advertise its fine dining more directly to the public as a B&B Inn restaurant, without the present requirement for reservations.

Since white table cloth, fine dining is offered at a comparatively higher price point, Fairview anticipates no more than 50 diners a night.... [R.227].

The impact on Fairview's neighbors of being able to call its fine dining a B&B 'restaurant' would be negligible: a) No zoning change or adverse precedent is proposed: b) No change in parking is proposed: At most, the 50 diners that Fairview would hope to serve nightly would take up perhaps 30 parking spaces in the 106-space parking lot Fairview leases from Baptist Health Systems next door at the 1600 Building. c) No change in street appearance is proposed: The entrance to Fairview's dining room is behind the main house, a short walk down the driveway from the new cut-through from the parking lot of the adjacent 1600 [Baptist Medical] building, and is not visible at all from the street. ...d) Restrictions on the use of alcohol for a B&B restaurant are proposed: The proposed amendments, as clarified by the BIA's modifications ...requires that meals or alcoholic beverages be served at the same table at which they would be consumed. With that restriction, Fairview could never have a free-standing bar for the restaurant. Nor, given the unique ambiance and elegance of Fairview as an historic Inn, would we ever want such an operation at the Inn." (R.227-229).

Similarly:

Don Ketner: "And there will be no changes to the property, which ...property is very compatible with the street where my family lives." (R.79-81).

Senator John Hohrn: "...parking is not a problem. There are 44 slots on site, there are 106 sites immediately adjacent to the property. Parking is not a problem." (R.72).

Also, in the case of the existing Class B permit holder, the Fairview Inn, the City Council amended Text Amendment 5 to include the requirement that the Inn go through the process of the City's established Site Plan Review Committee.⁵ The Site Plan Review process is a means of ensuring that the addition of a restaurant use to the historic inn would pose no impact on the neighborhood. Council person Margaret Barrett-Simon moved for adoption of the amendment:

Council member Margaret Barrett-Simon: "I would like to offer an amendment that that this will go before site plan so that we can resolve any traffic issues, delivery issues, that sort of thing.... ...I suggest you say, 'And site plan clearance from city staff.'" (R.143).

⁵ The Site Plan Review Committee is chaired by the Planning Director and consists of representatives of the following City Departments and/or Divisions: Water/Sewer Utilities, Streets, Bridges and Drainage, Fire Department, Building and Permit, City Traffic Engineering, Legal Department, Landscape Ordinance Administration, Zoning Administration, Police Department and Land Use Planning Department. R.E., Ordinance Section 1202-A, p.93.

Council member McLemore: “Ms. Fox that would enable the Site Plan Review Committee to thoroughly review all the specifications?” (R.144).

Corrine Fox [City Planning Department]: “Yes, sir, it would.” (R.144).

So the City of Jackson took every precaution to see that the proposed Text Amendment 5 would not pose any impact on the Belhaven neighborhood, not simply granting the additional use to the existing permit holder, but requiring that the Fairview Inn go before the Site Plan Committee of representatives of the major City departments, including Zoning and Traffic. In fact, as the Circuit Court found, quoting *Mississippi Manufactured Housing*:

However, here, Fairview’s failure to show a specific change of the Belhaven neighborhood ‘is only true because there is no showing that the amendment resulted in any property owner having the current use of his property altered’ [*Mississippi Manufactured Housing Ass’n v. Tate Co.*, 878 So.2d at 187], other than vague conjecture.

Opinion, R.E. p. 12.

The Circuit Court then emphasized that it agreed that the Council’s adoption of Text Amendment 5 did not constitute a rezoning:

Moreover, the Court agrees with the City in its position that the Council’s action does not constitute re-zoning. The text amendments do not make any changes to the City’s zoning map. As previously stated herein, Belhaven will maintain its R-2 zoning classification and, as pointed out by Carol Simmons, Fairview will continue to be an owner-occupied Bed-and-Breakfast Inn within a historic mansion listed on the National Register of Historic Places (R.228). The amendments simply modify a ‘use’ definition unique to Bed-and-Breakfast Inns that are required to be: (1) listed on the National Register of Historic Places; or (2) designated as a historic landmark by the Mississippi Department of Archives and History and/or the Jackson Historic Preservation Commission; or (3) deemed eligible for such historic status. [Citing Jackson zoning ordinance 602.02.3 (R.154)]. Thus, the amendments will not open the proverbial floodgates unleashing commercial development that would be inconsistent with the Belhaven Historic Preservation District.

The requirements for off-street parking, loading, and unloading have not been altered, and the amendment to Section 602.02.03(4) specifically requires site-plan review by City Staff (R.158). That means that in accordance with Section 1201-A (R.190), a Bed-and-Breakfast Inn with Restaurant, such as Fairview, must be

reviewed by city personnel to ensure compliance with City zoning and other ordinances...' (R.190).

R.E., Opinion, pp. 12-13.

Appellants' citation to the extreme circumstances presented in *Drews v. City of Hattiesburg*, 904 So.2d 138 (Miss.2005) involving six (6) requested zoning variances is totally inapposite and contrasts greatly to the modest provisions of Text Amendment 5. In *Drews* a medical office project requested six (6) zoning variances for the purpose of building a medical office building in a professional business district so that the owner could reduce the required setback and parking requirements and increase the height and size of the building allowed from 35 to 45 feet in height, and from 10,000 to 60,000 square feet in size. Although the city's ordinance allowed variances "to authorize minor departures from the terms of the ordinance", the Supreme Court of Mississippi found that, "the changes proposed are so dramatic that they constitute a rezoning to B-3, two levels beyond the B-1 (professional business district) lots in question", and that the differences were "so extreme that if the variances are granted, spot zoning would occur." 904 So.2d at 141-142.

By contrast, providing by text amendment that any existing Class B Inn permit holder, in this case The Fairview Inn, could add a restaurant use involved no physical variances at all: no change to the previously approved physical site plan for the Inn; no change to the Inn's minimum set-backs; no change to either the height or square footage of the historic Inn mansion; no change to the Inn's existing off-street parking; and no change to the Inn's lovely, residential appearance. After all, the restaurant is located in the Inn's existing dining room with its own separate entrance tucked behind the mansion, entirely invisible from the street (and thus invisible also from the view of Appellants' houses). (R. 229; See photos, R. 246-251). Indeed, the only physical change made to the Inn in anticipation of the restaurant required no permission from the

City: the building of a cut-through gate connecting the parking area of the adjacent 1600 medical building lot (leased at night and on weekends by the Inn) to the Inn's existing drive leading to the dining room's front door behind the Inn. (See R. 253-255).

Nor was the provision in Text Amendment 5 for addition of a restaurant use to the existing Class B Inn a stretch from the existing permanent use permit that The Fairview Inn had enjoyed for the prior eleven (11) years. The Inn since 1993 had already held permission to use its dining rooms for the service of fine dining to its lodgers and social functions, including, in the words of the City's zoning administrators: "celebrations of graduations" (R.6); "holiday parties" (R.10); "wedding receptions, luncheon parties, cocktail parties"; and other "functions and receptions". (R.14, 17). The Council properly determined that the additional offering of fine dining to an estimated 50 or fewer patrons a night at the historic Inn on a non-reservations basis would present nothing more than a minor, incremental change in the existing permanent use permit of the Inn already providing dining to functions on a "reservations only" basis. The provision of Text Amendment 5 was not an impermissible *de facto* rezoning or "spot zoning" of the Fairview Inn of the sort presented in *Drews*. The Fairview Inn remains an historic, owner-occupied Class B Bed and Breakfast Inn with the restrictions of a permanent use permit, all within a R-2 designated residential area, with no "spot zoning" or, indeed, any rezoning occurring.

III. THE PROCEDURES THE COUNCIL USED IN ITS ADOPTION OF TEXT AMENDMENT 5 AND THE PROCEDURES IT ADOPTED IN TEXT AMENDMENT 5 ITSELF FOR AN EXISTING INN TO OBTAIN RESTAURANT USE WERE ALL WITHIN THE CITY'S DISCRETION, AND DID NOT VIOLATE THE APPELLANTS' DUE PROCESS RIGHTS TO A FULL AND FAIR HEARING

A. The City Council's Procedures in its Adoption of Text Amendment 5 and In Text Amendment 5 for An Existing Class B Bed and Breakfast Inn to Add a Restaurant Use Under its Permit Were All Within the Council's Discretion

Text Amendment 5 was not, as Appellants contend, an “automatic grant” of a use permit: the existing permit holder already had a use permit as a Class B Inn. Further, the conditions Text Amendment 5 imposed on the existing Class B Inn permit holder to add a restaurant use were notification of the City of its election and then clearance from the City’s Site Plan Review Committee. (R.158). Appellants chose not appeal the City Site Plan Review Committee’s eventual site plan approval application for the Inn restaurant. The Fairview’s Inn’s compliance with the City’s stated conditions for the addition of restaurant use under its existing Class B Inn permit is not at issue. The only issue is the Council’s adoption of Text Amendment 5.

The City Council’s means for the taking of evidence in support of the adoption of Text Amendment 5 was wholly in its discretion so long as complied with the rights of the Appellant’s to due process. Further, the City’s adoption in Text Amendment 5 of a procedure for the existing Class B Inn permit holder to add a restaurant use upon the condition of clearance from the City’s Site Plan Review Committee was within the City’s legislative discretion. The Fairview Inn had already gone through the use permitting process in 1993 to establish its Class B Inn use permit, and again in 1999 and 2001 when it changed its site plan to add additional rooms for lodging. (R.338-344). Further, the Fairview Inn over its eleven years as a Class B Inn permit holder had established a track record as the “North America and Caribbean Most Outstanding Inn” (R.322-325). It was entirely reasonable for the City Council, therefore, not to require in Text Amendment 5 that the existing Class B Inn permit holder apply again for a new use permit or go through another, repetitive, administratively wasteful and expensive hearing for a new use permit apart from the hearing of both sides on April 7, 2004 for adoption of the amendment, and apart from the Site Plan Review Committee’s consideration. Moreover, the City’s determination of procedural requisites it would require, and whether those requisites were met, were all matters

committed by law to the full discretion of the City Council so long as it afforded due process rights to the objectors. Thus, as the Mississippi Supreme Court stated in *Thrash*:

The City, in its brief, not surprisingly, denies that there were any such procedural irregularities. **The operative question, however, is not so much that as it is identification of the proper authority for deciding whether there were any such procedural irregularities. Here again we reiterate that zoning is a legislative function and that the City Council and its City Planning Board function in a legislative capacity. The procedural rules and regulations found in the City Zoning Ordinance are in aid of the City's performance of its legislative zoning function. With two exceptions to be noted below, it is the City which is vested with final authority for determining whether its procedural requisites have been met or, if it pleases, waiving them.** [Citations omitted].

The first exception concerns those cases wherein the municipal zoning authorities may be said to have transgressed some important limitation or procedure imposed by state law. [citations omitted]. None of Objectors' procedural complaints fall within this exception, as each is premised solely upon the Zoning Ordinance of Jackson, Mississippi, adopted May 29, 1974, as amended.

The other exception appears where the procedural deficiencies may be said to have contravened a citizen's due process rights.

Thrash, 498 So.2d at 807.

Therefore, "[t]he City enjoys great discretion". *Fondren North Renaissance v. City of Jackson*, 749, So.2d 974, 981 (Miss.1999) (citing *Thrash*). As long as the City met its due process obligations, it had the procedural discretion to determine how it would hear substantial evidence supporting its adoption of the Amendment. The amendment's procedure for the existing permit holder (who had gone through use permit proceedings in 1993, 1999 and 2001, R.339-344) was reasonable since requiring a separate use permit hearing that would repeat the same evidence given already by the same public witnesses to Text Amendment 5 both before the Planning Board and before the Council would be administratively wasteful. Indeed, the Council's decision that the existing Class B permit holder should go through site plan review was a reasonably efficient alternative. Therefore, **“[w]hether there was compliance with other procedural rules not implicating due process considerations is a matter committed to the**

authority of the Jackson City Council in its legislative capacity and not subject to review here.” (Emphasis added). *Id.*; *Thrash*, 498 So.2d at 808.

The City’s means for the taking of evidence in support of the adoption of Text Amendment 5 was wholly in its reasonable discretion (and was not arbitrary or capricious) so long as it met the Appellant’s due process rights. Further, the City’s adoption of a procedure in Text Amendment 5 for the existing permit holder to add a restaurant use was a reasonable exercise of the City’s legislative discretion, that was at the very least fairly debatable, and, as we will see below in detail (at Section C), was in fact intensely debated before the City Council.

B. The City Council Did Not Violate Appellants’ Rights to Due Process

Appellants do assert that the exception noted in *Thrash* to the City’s discretion applies here, namely that their due process rights were violated. However, *Thrash* addresses that issue as well. What the Supreme Court of Mississippi said of the due process rights of the objectors in *Thrash* applies equally here to the Appellants:

...we consider it beyond debate that the essence of the due process rights, if any, guaranteed to Thrash and the other Objectors is reasonable advance notice of the substance of the rezoning proposal together with the opportunity to be heard at all critical stages of the process. [Citations omitted]. The record abundantly reflects that Objectors in fact had ample advance notice. They appeared before the Zoning Hearing Committee of the City of Jackson Planning Board, personally and through counsel, and were given full opportunity to present any and all matters they wished. Similarly, when the matter was presented to the Jackson City Council on the question of whether the rezoning ordinance would be adopted, again Objectors were given full and fair opportunity to present their views.

(Emphasis added). *Thrash*, 498 So.2d 801, 807-808.

The record here reflects that the Appellants likewise received both actual notice of the initial hearing before the Planning Board in addition to published notice, and subsequently appeared at the Planning Board hearing with legal counsel, witnesses, written memoranda and

exhibits. (R.345-349, 358-445). Similarly the Appellants received published notice of the Council hearing (as continued over from March 17, 2004 to the Council's regular zoning meeting on April 7, 2004) (R.327-328, 148-175). The Appellants then proceeded to appear at the Council hearing on April 7, 2004 with counsel, multiple witnesses, and three memoranda with numerous exhibits attached totaling 108 pages of memoranda and exhibits (R.1-147, 160-213, 446-450, 452-503). Appellants' counsel also introduced into the record the 87 page transcript of the hearing before the Planning Board. (R. 60, 358-445). The City Council afforded to the Appellants all their due process rights to a full and fair hearing upon the Council's adoption of Text Amendment 5, and the Appellants availed themselves of the process.

Appellants assert that "the entire group of 28 homeowners objecting to the Fairview Amendments was afforded just ten minutes to present evidence and argument in opposition to the amendments." (Baker Brief p.40). However, the ten (10) minute limitation before the City Council applied only to the presentations of the attorneys for the proponents and opponents. (R.40, 50). The Council President promised to "listen to all the folks that have signed the book to speak" on both sides (R.70). The Council then proceeded to hear from 19 citizens in favor of the amendments and 4 citizens opposing the amendments. The objectors speaking included two of the Appellants and their designated counsel, Appellant Dan Baker. In all, the City Council hearing created a 147 page hearing transcript plus many pages of memoranda and exhibits for the record. The Council fully heard from the Appellants and their witnesses. Appellants did not indicate that they had anything more to say than what they said over the course of so many pages of transcripts, memoranda and exhibits.

Nor is it any moment that that Text Amendment 5 required the existing Class B Inn permit holder to obtain a clearance from the Site Plan Review Committee, instead of a filing a new "application" under the City's procedures for a new permit. (Baker brief p.41). Again: "it

is the City which is vested with final authority for determining whether its procedural requisites have been met or, if it pleases, waiving them”. *Thrash*, 498 So.2d at 807-808 (Miss.1986). The City’s procedures for adoption of Text Amendment 5 were within the City’s full discretion as long as it met its due process obligations to the Appellants which it patently and obviously did.

“‘Substantial evidence has been defined as ‘such relevant evidence as reasonable minds might accept as adequate to support a conclusion’ or to put it simply, more than a ‘mere scintilla’ of evidence.’” *Vulcan Lands, Inc. v. City of Olive Branch, Mississippi*, No.2003-CA-01514-COA at ¶7 (Miss.App.2005). Since the City Council’s decision approving Text Amendment 5 is, “founded upon substantial evidence, then it is binding upon an appellate court....” *Perez v. Garden Community Isle Association*, 882 So.2d 217, 220 (Miss.2004).

C. The Circuit Court Properly Found that the City Council’s Adoption of Text Amendment 5 Was “Fairly Debatable”, Not Arbitrary or Capricious, Illegal or Without a Substantial Evidentiary Basis

The Circuit Court ultimately found:

For all the aforesaid reasons, this Court finds that the amendments have been ‘make with reasonable consideration, among other things, to the character of the district and its particular suitability for particular uses, and with a view to conserving the value of buildings, and encouraging the most appropriate use of land’ within the district. [Citing § 17-1-9 Miss. Code Ann.]. The Court further finds that the amendments’ enactment was not arbitrary, capricious, discriminatory, illegal, or without a substantial basis.

Opinion, R.E. p. 13.

Further, appellants had plenty to say in the debate over adoption of Amendment 5 both in person and by detailed written memoranda and exhibits. See e.g., the memoranda and attached exhibits offered by the Appellants at R.160-213, 446-450, and 452-503, altogether totaling 108 pages. Text Amendment 5 proved to be at the very least a “fairly debatable” issue that received every consideration by the Council. At the end of the day, the City’s adoption of Text Amendment 5 stands as a presumptively valid exercise of the Council’s discretion and legislative

judgment, backed by substantial evidence. It cannot be retried on appeal. This Court cannot “re-weigh” the evidence. *Kuluz*, 890 So.2d at 943, ¶10.

Therefore, the Circuit Court concluded (Opinion, R.E. p. 14):

The City Council received input from all interested parties, including the differing perceptions of the public as to the effect of the amendments. The question for this Court, however, is not to determine which view or perception is correct or the more rational. Rather, the question is whether the municipal government, in exercising its police power to enact legislation, has responded in a rational way to a perceived need. The City Council did so, and whether either side’s arguments are better reasoned ‘does not rump the democratic process; the remedy is public debate and persuasion and not judicial fiat or ukase.’ [Citing *Colo. Mfg. Hous. Ass’n. v. City of Salida, Colo.*, 977 F.Supp. 1080, 1086-87 (D.Colo.1997)].

Or, as the Mississippi Court of Appeals has stated:

The minutes of the city council summarized the testimony of citizens voicing their opinions in support of, and in protest to, the proposed expansion. ...it is apparent that the city’s decision to grant the conditional use can be viewed as ‘fairly debatable’, and therefore, we will afford deference to the decision.

Beasley v. Neelly, 911 So.2d at 608.

With so much evidence placed before the City Council by the attorneys for both side plus the testimony of a total of 23 public witnesses for the parties represented, the City Council’s adoption of Text Amendment 5 was on a, “record...replete with evidence offered by both parties during the public hearings”. *Hudson*, 774 So.2d at 453. The Appellants have not met their burden on appeal to show that the Amendment was “not supported by substantial evidence”, was “illegal” or “not fairly debatable” or was “arbitrary and capricious”. *City of Ridgeland v. Estate of M.A. Lewis*, 963 So.2d at 1214 ¶9 (Miss.App.2007).




CONCLUSION

The adoption of Text Amendment 5 was the well considered act of the City Council of the City of Jackson and was in the lawful exercise of its legislative discretion. The Appellants have not met their burden on appeal to show that Text Amendment 5 was “not supported by substantial evidence”, was “illegal”, was “not fairly debatable”, or was “arbitrary and capricious”. Therefore, this Court on appeal should affirm the Opinion of the Circuit Court upholding the Jackson City Council’s adoption of Text Amendment 5.

Respectfully submitted,

MAYOR HARVEY JOHNSON, IN HIS OFFICIAL
CAPACITY ONLY AND THE CITY COUNCIL OF
JACKSON, MISSISSIPPI, APPELLEES

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AMENDED CERTIFICATE OF SERVICE

I, CLAIRE BARKER HAWKINS, attorney for Appellees, do hereby certify that I have this day served via United States mail, a true and correct copy of the foregoing Response Brief to be mailed by U.S. mail, postage prepaid, to the Appellants as follows:

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Hon. Bobby DeLaughter
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Jackson, Mississippi 39201
Presiding Judge

This the 5th day of January, 2009.



Claire Barker Hawkins

CERTIFICATE OF SERVICE

I, Pieter Teeuwissen, Special Assistant to the City Attorney of the City of Jackson, do hereby certify that I have this day caused a true and correct copy of the foregoing Response Brief to be mailed by US Mail, postage prepaid, to the Appellants as follows:

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This the 5 day of January, 2009.

Claire Barker Haulkins for
Pieter Teeuwissen Pieter Teeuwissen

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FILED

JAN 08 2009

IN THE SUPREME COURT OF MISSISSIPPI

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

**MARK C. MODAK-TRURAN and
ANITA K. MODAK-TRURAN and
DANIEL M. BAKEAR and
KATHERINE S. BAKER**

APPELLANTS

VS.

CAUSE NO. 2008 CA-00104

CONSOLIDATED WITH CAUSE NO. 2008-CA-00105

**MAYOR HARVEY JOHNSON, In his
Official capacity and THE CITY COUNCIL
OF JACKSON, MISSISSIPPI, CAROL N.
SIMMONS AND WILLIAM J. SIMMONS,
DECEASED D/B/A THE FAIRVIEW INN**

APPELLEES

**MOTION FOR LEAVE OF COURT
TO FILE SUPPLEMENTAL RESPONSE**

Come now, Appellees Mayor Harvey Johnson, in his official capacity, and the City Council of Jackson Mississippi, by and through counsel and pursuant to Miss.R.App.Proc. 27(b), and file their Motion for Leave of Court to File Supplemental Response Brief to the Brief of Mark c and Anita K. Modak-Truran, and in support thereof would show the Court the following:

1. The Appellees' Response Briefs in the above referenced consolidated matter were filed on Monday, January 5, 2009.
2. In the appeal submitted by Appellants Modak-Truran, the issue of whether the Appellants' procedural and substantive due process rights were violated by former Mayor Harvey Johnson and the City Council of Jackson was raised by the Modak-Trurans.
3. Inadvertently, the Appellees did not respond to this section of the Modak-Truran Brief. Due to the fact that this argument contains constitutional issues, it is

MOTION 2029-02 **COPY**

necessary that the Court have the opportunity to consider the response of the Appellees to the Modak-Trurans' assertions.

4. Thus, the Appellees respectfully request leave of Court in order to file a Supplemental Response (in the form and substance attached hereto as Exhibit "A") only to the assertions regarding the Modak-Trurans' alleged procedural and substantive due rights violations. The proposed supplemented argument will serve as the City's final argument and is labeled as Roman Numeral V. The Appellees' initial brief is twenty-three (23) pages in length, thus the Supplemental Brief will not exceed the number of pages allowed by M.R.A.P. 28(g). Moreover, the opportunity for the Appellees to submit a Supplemental Brief will not prejudice any parties to this matter; rather, it is necessary for the achievement of justice.

5. Should this Court grant the Appellees Motion for Leave to Supplement Brief, the Amended Table of Contents reflecting the addition of the argument is attached as Exhibit "B." Additionally, the Amended Table of Authorities reflecting the newly added caselaw is attached as Exhibit "C."

6. This motion is not filed for delay; only that justice may be served.

WHEREFORE PREMISES CONSIDERED, former Mayor Harvey Johnson and the Jackson City Council pray that this Court will grant the Appellees leave of court to file their Supplemental Response Brief in this matter. And the Appellees pray for such other and general relief as this Court deems appropriate.

RESPECTFULLY SUBMITTED, this the 8th day of January 2009.

FORMER MAYOR HARVEY JOHNSON, IN HIS OFFICIAL
CAPACITY
JACKSON CITY COUNCIL

SARAH O'REILLY-EVANS, CITY ATTORNEY

By: 
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I, CLAIRE BARKER HAWKINS, attorney for Appellees, do hereby certify that I have this day served via United States mail, a true and correct copy of the foregoing Motion for Leave of Court to File Supplemental Response Brief to be mailed by U.S. mail, postage prepaid, to the Appellants as follows:

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Jackson, Mississippi 39201
Presiding Judge

This the 8th day of January, 2009.



Claire Barker Hawkins

All presumptions must be indulged in favor of the validity of zoning ordinances. It is presumed to be reasonable and for the public good. It is presumed that the legislative body investigated it and found conditions such that the action which it took was appropriate. **The one assailing the validity has the burden of proof to establish that the ordinance is invalid or arbitrary or unreasonable as to his property, and this must be by clear and convincing evidence.**

Ballard v. Smith, 107 So. 2d 580, 586 (Miss. 1958)(emphasis added).

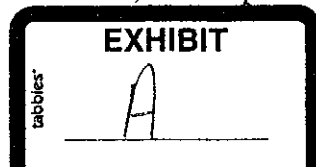
Here, there is no proof that the establishment of a Bed and Breakfast Inn Class B is arbitrary, unreasonable or unfair in its application. Nothing in the ordinance is discriminatory and nothing in the ordinance will result in a violation of one's due process. Thus, the Modak-Trurans argument that the amendments are arbitrary or that the Fairview Inn is afforded preferential treatment is without merit.

V. The Modak-Trurans fail to demonstrate that their due process rights have been violated.

A. Substantive Due Process.

The Modak-Trurans argue that Text Amendment 5 enacted by the City of Jackson on April 7, 2004, violated their substantive due process rights, citing **Washington v. Glucksberg**, 521 U.S. 702 (1997), in support of their argument that they are entitled to "more than fair process." The Modak-Trurans also point out that substantive due process violations are actionable under 42 U.S.C. § 1983; yet, this action is an appeal of a zoning decision of the City of Jackson. The Modak-Trurans have never filed a § 1983 action against the City of Jackson and discussion of such an action is irrelevant to this appeal.

Certainly, the United States Constitution guarantees, "No State . . . shall deprive any person of life, liberty or property without due process of law." In the cases relied on by the Modak-Trurans, the Supreme Court discussed the liberty interests guaranteed by



substantive due process. Substantive due process “provides heightened protection against government interference with **certain** fundamental rights and liberty interests.” **Glucksberg**, 521 U.S. at 720 (emphasis added). The Supreme Court has required “a careful description of the asserted fundamental liberty interest” and has limited protection to specific freedoms in the Bill of Rights and specially protected rights as delineated by the United States Supreme Court, such as the right to marry or the right to marital privacy. **Id.** at 720-21. The Modak-Trurans’ substantive due process arguments fail because they rely on **Glucksberg**, but neglect to describe what liberty interest of theirs the City of Jackson has violated.

Even assuming that the Modak-Trurans’ substantive due process attack on Text Amendment 5 is related to a deprivation of property, rather than a deprivation of liberty, the substantive due process argument still fails. To prevail on a substantive due process claim related to property deprivation, the Modak-Trurans must first establish a constitutionally protected property right to which substantive due process protection applies. **Simi Investment Co. v. Harris Co., Texas**, 236 F.3d 240, 249-50 (5th Cir. 2000). “In order to assert a violation of [substantive due process], one must at least demonstrate the deprivation of a protected property interest established through some independent source such as state law.” **Id.** The Modak-Trurans provide a list of changes which they claim, without any substantiation other than rank speculation, result from the City’s actions, but they fail to provide any law that gives rise to a constitutionally protected property interest to be free of those alleged results.

Even if the Modak-Trurans had established a constitutionally protected property interest, they must next show that the City’s actions were not rationally related to any

conceivable legitimate governmental interest. *Id.* at 251. Amendments to zoning ordinances are a

valid exercise of the police power if it is substantially related to the public health, safety, morals or general welfare. ***Village of Euclid v. Ambler Realty***, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). Substantive due process requirements are met if an ordinance serves a public purpose, the means adopted are reasonably necessary to accomplish that purpose and the regulation is not unduly oppressive. ***Goldblatt v. Town of Hempstead***, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962). “The key inquiry is whether the question [of the existence of a legitimate reason for a particular zoning ordinance] is ‘at least debatable’ ... If it is, there is no denial of substantive due process as a matter of federal constitutional law.” ***Vance v. Bradley***, 440 U.S. 93, 110-111, 99 S.Ct. 939, 949, 59 L.Ed.2d 171 (1979).

Petition of Carpenter v. City of Petal, 699 So. 2d 928, 932 (Miss. 1997). In ***Euclid***, the United States Supreme Court held that a zoning action could not be said to be unconstitutional unless it was “arbitrary and unreasonable.” ***Euclid***, 272 U.S. at 394.

The Modak-Trurans cannot show and do not show how the City’s action was arbitrary and unreasonable and cannot and do not show that the City of Jackson’s action failed to meet the above standard for a valid zoning action. Certainly, the City’s action was not arbitrary, as it heard numerous comments from members of the public who were both for and against text Amendment 5 prior to making its decision. The City’s action was not unreasonable given the City’s March 2004 change to a mixed-use oriented comprehensive land use plan; Text Amendment 5 was in line with the City’s changes to city-wide development planning. As the ultimate “responsible organ of government” for municipal government for the City of Jackson, the City Council, having heard those comments and having weighed the needs of the City in light of the new Comprehensive Plan, cannot be said to have acted arbitrarily or unreasonably in

enacting the Text Amendment 5. The Modak-Trurans substantive due process rights were not violated and their arguments are frivolous.

B. Procedural Due Process.

The Modak-Trurans argue that the text amendments enacted by the City of Jackson on April 7, 2004, violated their procedural due process rights. Certainly, as the Modak-Trurans state, “the basic rights of procedural due process are reasonable notice of a hearing and a reasonable opportunity to be heard. *Matthews v. Eldridge*, 424 U.S. 319 (1976). Not only did the Modak-Trurans receive reasonable notice of the Planning Board hearing and the City Council hearing and a reasonable opportunity to be heard, they, in fact, exercised their right to be heard, speaking at both the Planning Board hearing and the City Council’s zoning hearings.

“The basis of procedural due process is simply that parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified. Furthermore, they must be notified in a manner and at a time that is meaningful.” *Aldridge v. Aldridge*, 527 So. 2d 96 (Miss. 1988) (internal citations and quotations omitted). Though a text amendment only requires notice published in the newspaper, on January 15, 2004, Crane D. Kipp, attorney for The Fairview Inn, sent Notice of Hearing to all real property owners located within 160 feet of the property on which The Fairview Inn is located regarding the January 28, 2004, hearing before the Planning Board of the City of Jackson. (R.346-49.) Having received that specific Notice, appellants herein, Daniel M. Baker and Mark C. Modak-Truran, appeared at that Planning Board hearing and participated, making statements and submitting memoranda and evidence to the Planning Board. (R.407-20.) Appellants also appeared at the Jackson City Council zoning meeting held on April 7, 2004, where the

City Council adopted the proposed text amendments and participated similarly therein. (R.61-70; R.123-29.)

The Modak-Trurans cite *McGautha v. California*, 402 U.S. 183 (1971), for the proposition that procedural due process requires that

procedures for the exercise of municipal power [must] 'be structured such that fundamental choices among competing municipal policies are resolved by a responsible organ of government' and that 'a municipality protects individual [sic] against the arbitrary exercise of municipal power, by assuring that fundamental policy choices underlying the exercise of that power are articulated by some responsible organ of municipal government.'

The Zoning Ordinance of the City of Jackson recognizes this principle, requiring any text amendments to be passed by the City Council only after a public hearing has been held, at which time any individual is allowed to present their viewpoint. See ZONING ORDINANCE § 1704-A. The City Council is the ultimate "responsible organ of municipal government" for the City of Jackson and after hearing from supporters and opponents of Text Amendment 5, the City Council enacted the text amendments at issue here. (R.154-59.) The City of Jackson's zoning procedures meet the requirements of procedural due process.

As the record shows, the Modak-Trurans and other affected property owners received meaningful notice of the Planning Board hearing and of the City Council hearing, as evidenced by their meaningful, extensive participation in each. They were given the opportunity to be heard and they took full advantage of that opportunity. The Modak-Trurans cannot argue that their procedural due process rights were violated because of their disappointment with the outcome of Planning Board and City Council hearings that did not go in their favor. The Modak-Trurans' arguments concerning procedural due process are without merit.

CONCLUSION

The adoption of Text Amendment 5 was the well considered act of the City Council of the City of Jackson and was in the lawful exercise of its legislative discretion. The Appellants have not met their burden on appeal to show that Text Amendment 5 was “not supported by substantial evidence”, was “illegal”, was “not fairly debatable”, or was “arbitrary and capricious” nor have shown that they were deprived of any of their constitutionally guaranteed due process protections or that the Text Amendments were in any wise unconstitutionally vague. Therefore, this Court on appeal should affirm the Opinion of the Circuit Court upholding the Jackson City Council’s adoption of Text Amendment 5.

Respectfully submitted,

MAYOR HARVEY JOHNSON, IN HIS OFFICIAL
CAPACITY ONLY, AND THE CITY COUNCIL OF
JACKSON, MISSISSIPPI, APPELLEES

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Presiding Judge

This the 5th day of January, 2009.



Claire Barker Hawkins

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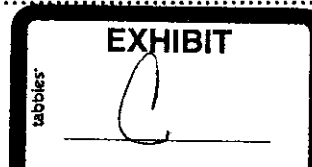
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